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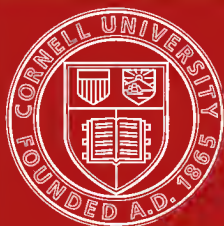
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THE
LAW OF BANK CHECKS

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of the New York Bar

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PREFACE

Herein is undertaken a presentation of the principles of law applicable to bank checks. Ordinarily the law relating to bank checks is found partly in works on the law of banking and partly in treatises on the law of negotiable instruments. The object of this volume is to bring together all the law affecting bank checks and to present in their proper sequence the rules of law, which regulate the rights and liabilities of parties to such instruments.

Since the adoption of the Uniform Negotiable Instruments Act in New York in 1897, that statute has become a law in forty-two other states, the District of Columbia, and Hawaii. Bank checks are affected by many of its sections; the statute expressly declares that its provisions, applicable to a bill of exchange, payable on demand, apply also to a check. For this reason, the statute, which is frequently cited in the footnotes, is given in full in the Appendix. Unfortunately for the uniformity of the statute it has not been adopted in all states without change. The legislatures of many of the states saw fit to make radical alterations in it before permitting it to become a law. The changes made in the different states are set forth immediately after the sections to which they apply.

Kind indulgence, in the overlooking of such imperfections as may appear, is asked of those, into whose hands this book may come.

J. E. B.

New York City,
April 9, 1915.

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THE LAW OF BANK CHECKS

CHAPTER I.

GENERAL PRINCIPLES.

- §1. Origin and Development of Bank Checks.
- §2. Definition and Characteristics of Checks.
- §3. Days of Grace.
- §4. Rights of Holder of Check Against Bank.
- §5. Where Check Held to Operate as an Assignment.
- §6. Check as an Assignment Under the Negotiable Instruments Law.
- §7. When Action on Check is Barred by Statute of Limitations.
- §8. Payment by Check.

§1. Origin and Development of Bank Checks.—Bank checks first came into comparatively general use in England about the year 1780. While the derivation is disputed, it is said that the word check, as applied to commercial paper, arose from the practice of placing serial numbers upon these instruments which were intended to operate as a check or means of verification.¹ Bills of exchange were common enough at the time when checks were first introduced, and, in its construction, the check was not unlike the ordinary bill of exchange. The bill of exchange is, of course, of much greater antiquity than the bank check, and its origin is involved in considerable obscurity. By some of the authorities it has been stated that the bill of exchange was first used by the Jews of Lombardy in the fourteenth century to offset the dangers which attended the transportation of gold from one place to another. In its origin the bill of exchange was simply a letter from one business man to another, or from one friend to another, asking him to pay a certain sum of money to the bearer of the letter or to a person named in the letter.²

1. Thompson's Dictionary of Banking.

2. Sherwood's History & Theory of Money, p. 118.

The principal characteristics by which a check was distinguished from the ordinary bill of exchange were that it was drawn on a banker and was payable to bearer on demand. The bank check in use to-day has retained these distinguishing marks except that it has become customary for the drawer of a check to exercise his option as to whether he will make it payable to bearer or to the order of a particular person.

The bank check is the natural outgrowth of the development of banking. Banking, in the modern sense of the word, had no existence in England before 1640. Up to that date merchants had been for a considerable time in the habit of depositing their bullion and cash in the mint in the tower, under the guardianship of the Crown. In that year, however, Charles I, being in great straits for money, owing to his fatal dissolution of Parliament before it had voted supplies, seized upon the merchants' bullion and cash in the mint. The merchants eventually lost nothing by the transaction, but the experience lessened their confidence in the royal bank and they began to keep their cash in their own houses. They soon found that, owing to the dishonesty of their employes and others, their funds were no safer than before, and there came into vogue among the merchants of England the practice of sending their money for safe-keeping to the goldsmiths, who were equipped with strong boxes in which to keep their own valuables, and were willing to receive the merchants' money on deposit and to repay it to them on demand with interest at six per cent³. It was then a natural step for a merchant, having gold deposited with a goldsmith, to pay a debt by delivering to his creditor an order upon the goldsmith for the amount of the obligation. The goldsmiths finally became the bankers of England and the orders thus drawn upon them were the beginning of bank checks.

Not long after its introduction into commercial use the bank check began to take the place of the bank notes theretofore issued by the private bankers of London. The story of the wonderful growth of the bank check as a medium of exchange may be read in the statistics, which tell in hundreds of millions of dollars the amount which, in the form of checks, passes through the clearing houses of this country every day. No one can doubt that the bank check now performs a very

3. Sumner's History of Banking, vol. 2, p. 1.

important function in the commerce of the country and performs it with great efficiency.

§2. Definition and Characteristics of Checks.—A check may be defined to be a negotiable bill of exchange, payable on demand, and drawn upon a bank by a customer thereof.⁴ In the earlier decisions a check was defined as an instrument payable to bearer, and it was at one time generally held that an instrument was not a check unless it was payable to bearer.⁵ But it is now quite customary to draw checks payable to the order of a designated person, and instruments so payable come within the general definition of checks.

There has been much unnecessary confusion among the different courts in their attempts to give a definition to the word "check." Many of them have held, without reservation, that a check is not a bill of exchange, while, on the other hand, many of them hold distinctly that a check is a bill of exchange. The substance of what has been determined in this regard by the authorities is that checks are a species of bills of exchange, which have certain peculiar features of their own, not possessed by other bills. As some of the courts have expressed it, all checks are bills, but all bills are not checks.⁶

4. As to the essentials of negotiability, see, *infra*, §9—20.

5. *Woodruff v. Merchants Bank*, 25 Wend (N. Y.) 673.

6. *First Nat. Bank v. Nelson*, 105 Ala. 180, 16 So. Rep. 707.

Various Definitions of Checks.—A check is an inland bill of exchange, drawn on a bank and payable on demand, and such an instrument is payable on demand where no date is mentioned. *Riddle v. Bank of Montreal*, 145 N. Y. App. Div. 207, 130 N. Y. Supp. 15.

A check is denominated a species of inland bill of exchange,—not with all the incidents of an ordinary bill of exchange, it is true,—but still it belongs to that class and character of commercial paper. *Moses v. Franklin Bank*, 34 Md. 574.

When an instrument is drawn upon a bank, or a person engaged in the banking business, and simply directs the payment to a party of a specified sum of money, which is at the time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check. *Bull v. First Nat. Bank*, 123 U. S. 105.

Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawee. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The

While it is undoubtedly correct to say that a check is a bill of exchange, it is true that checks differ from other bills of exchange in many important particulars. A check is always drawn upon a bank or banker.⁷ And if not so drawn, as in the case of a bill drawn on a business house, the instrument is not a check.⁸ To constitute an instrument a check the bank upon which it is drawn must be a going concern, open for the payment of deposits, and not one which has failed or is in liquidation.⁹ An instrument is none the less a check because it is payable in a state other than the one in which it is drawn.¹⁰

drawer is not discharged by laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall, (U. S.) 604, 19 L. Ed. 1008.

A check is defined as a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand. *Farmers' Bank of Nashville v. Johnson, King & Co., Ga.*, 68 S. E. Rep. 85.

A check is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument. *Griffin v. Kemp*, 46 Ind. 172.

Checks are inland bills of exchange, *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. Rep. 239.

A check is a bill of exchange, payable on demand. *Chapman v. White*, 6 N. Y. 412.

A banker's check would be one in which the drawer was a banker, or the duly authorized agent of a bank, drawn on funds either in the bank of which he was an officer, or on those of some correspondent bank, in which his bank had funds deposited or on account, entitling the bank he represented to a credit. *Holland v. Mutual Fertilizer Co.*, 8 Ga. App. 714, 70 S. E. Rep. 151.

7. *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430. *Griffin v. Kemp*, 46 Ind. 172; *Lester & Co. v. Given*, 71 Ky. 357; *Bowen v. Newell*, 8 N. Y. 190; *Hobart Nat. Bank v. McMurrough*, Okla., 103 Pac. Rep. 601.

8. *Amsinck v. Rogers* 189 N. Y. 252, 82 N.E. 134, 121 Am. St. Rep. 858.

9. *Harmanson v. Bain*, 1 Hughes (U. S.) 188.

10. *Merchants' Nat. Bank v. Ritzinger*, 118 Ill. 484, 8 N. E. 834; *National Bank of America v. Indiana Banking Company*, 114 Ill. 483; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212.

A check requires no acceptance, as distinct from prompt payment, and the holder of a check, unlike the holder of other bills of exchange, cannot demand its acceptance as a matter of right.¹¹ It has been pointed out that the death of the drawer of a check revokes the authority of the bank to pay it, whereas the death of the drawer of other bills has no effect upon the duties of the other parties to the instrument.¹²

There is an important distinction between checks and other bills of exchange in the matter of presentment for payment and notice of dishonor. The drawer of an ordinary bill of exchange is liable for the payment thereof only on condition that it has been duly presented for payment at its maturity, and he has received due notice of its dishonor; and in case either of these conditions is not complied with the drawer is discharged, irrespective of whether he has suffered loss by the neglect. In the case of a check the drawer is treated as the principal debtor, and he is not discharged by any laches of the holder in the matter of making presentment and giving notice, unless he has suffered a loss or injury thereby, and then the drawer is discharged only to the extent of the loss.¹³ In other words, when the question arises as to whether the drawer of a check is discharged by a failure to properly present for payment, it is held that a check is not a bill of exchange.¹⁴ Checks have, however, frequently been held to be bills of exchange and subject to the rules of law which govern such instruments.¹⁵ Thus, a check has been held to be a bill of exchange within the meaning of a statute declaring that all bills of exchange payable to an existing person or bearer shall be deemed

11. *Farmers' Bank v. Johnson, King & Co.*, 134 Ga. 486, 68 S. E. Rep. 85; *Griffin v. Kemp*, 46 Ind. 172; *Hays v. Lathrop Bank*, 75 Mo. App. 211.

12. *Famous Shoe Co., v. Crosswhite*, 51 Mo. App. 55; *Hays v. Lathrop Bank*, 75 Mo. App. 211. See, *infra*, §172.

13. *Lester & Co. v. Given*, 71 Ky. 357. See *infra*, Presentment for Payment and Notice of Dishonor, Chap. VII and VIII.

14. *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430, A'f'd., 94 Fed. Rep. 925; *Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. Rep. 10.

15. *Morrison v. Farmers' & Merchants' Bank*, 9 Okla. 697, 60 Pac. Rep. 273; *First Nat. Bank v. Bank of Cottage Grove, Ore.*, 117 Pac. Rep. 293; *Neal v. Coburn*, 92 Me. 139, 42 Atl. Rep. 348.

The Negotiable Instruments Law, Section 321 of the New York Act, specifically declares that its provisions, applicable to bills of exchange payable on demand, shall apply to checks except where otherwise provided in the statute.

payable to such person or order,¹⁶ or a statute authorizing notaries to protest inland bills of exchange,¹⁷ or a statute requiring the acceptance of a bill of exchange to be in writing,¹⁸ or a statute limiting the time to commence an action on a bill,¹⁹ or a statute making it a felony to forge the indorsement of any bill of exchange.²⁰

§3. Days of Grace.—Questions pertaining to the allowance of days of grace on instruments drawn on banks have become of little importance in recent years by virtue of the general adoption of the Negotiable Instruments Law, declaring that every negotiable instrument is payable at the time fixed therein without grace. Nevertheless, cases involving such questions still retain an element of interest because of the fact that they incidentally bring in the inquiry as to what is and what is not a check. When the question of days of grace came up it was generally held that a check payable on demand was not entitled to the days of grace accorded to other bills of exchange.²¹

Where an instrument drawn on a bank, and purporting to be a check, specified a certain day when payment was to be made, it was generally held that the instrument was not a check, for the reason that it was not payable on demand, but was a bill of exchange entitled to grace.²² It has been held that,

16. *First Nat. Bank v. Nelson*, 105 Ala. 180, 16 So. Rep. 707.

17. *Moses v. Franklin Bank*, 34 Md. 574; *German Nat. Bank v. Beatrice Nat. Bank*, 63 Neb. 246, 88 N. W. Rep. 480.

18. *Risley v. Phenix Bank of New York*, 83 N. Y. 318, *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Garrettson v. North Atchison Bank* 47 Fed. Rep. 867.

19. *Rogers v. Durant*, 140 U. S. 298, 35 L. Ed. 481.

20. *Hawthorn v. State*, 56 Md. 530; *People v. Kemp* 76 Mich. 410, 43 N. W. Rep. 439.

21. *Griffin v. Kemp*, 46 Ind. 172; *Lester & Co. v. Given*, 71 Ky. 357; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. Rep. 239; *Fletcher v. Thompson*, 55 N. H. 308; *Morrison v. Bailey*, 5 Ohio St. 13; *Champion v. Gordon*, 70 Pa. 474.

22. *Minturn v. Fisher*, 4 Cal. 35; *Georgia Nat. Bank v. Henderson*, 46 Ga. 487; *Culter v. Reynolds*, 64 Ill. 321; *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488, 43 N. W. Rep. 336; *Ivory v. Bank of Missouri*, 36 Mo. 475. "If we hold that an instrument not payable on demand may be a check, we are left without any definite or precise rule to determine when the paper is a check, and when a bill of exchange. The fact that it is drawn on

even if such an instrument is a check, it is nevertheless entitled to days of grace, as the test of whether an instrument is entitled to grace depends upon its being made payable on a specified day, rather than upon its being drawn upon a bank.²³

On the other hand it has been held that an instrument drawn on a printed form of bank check, and similar to an ordinary check in all respects save that it is payable on a day subsequent to its date, is to be treated as a check, and not as a bill of exchange, and is not entitled to days of grace.²⁴ While this represents the minority view it may be supported on the theory that a check which designates a future day of payment is, in effect, a post-dated check, and, since the post-dating of a check does not destroy the character of the instrument as a check, the designation of a future day of payment ought not to have that effect.

§4. Rights of Holder of Check Against Bank.—By the great weight of authority the holder of a check has no claim thereon against the bank on which it is drawn, unless the bank has accepted or certified the check. The delivery of the check does not operate to assign to the holder any portion of the deposit, against which it is drawn, and the holder cannot, upon

a bank is not alone enough to distinguish a check from a bill of exchange, for nothing is better settled than that a bill of exchange may be drawn on a banker. Neither will the fact that the maker writes it on a 'blank check' be any test, for the kind of paper it is written on cannot control the import and legal effect of its words. Neither can the question whether it is drawn against a previous deposit of funds by the drawer with the drawee furnish any criterion, for nothing is clearer than that a bill of exchange, as well as a check can be drawn against such a deposit, and that an instrument may be a check although the drawer has no funds in the hands of the drawee. Neither will it do to say that if it is entitled to grace it is a bill, but if not entitled to grace, it is a check, because the legal character of the instrument has first to be determined before it can be known whether or not it is entitled to grace. In short, if we omit from the definition of a check the element of its being payable on demand, bankers and business men are left without any definite rule by which to govern their action in a matter where simplicity and precision of rule are especially desirable." *Harrison v. Nicolle*, Nat. Bank, 41 Minn. 488, 43 N. W. Rep. 336.

23. *Bowen v. Newell*, 8 N. Y. 190.

24. *Way v. Towle*, 155 Mass. 374, 29 N. E. Rep. 506; *Champion v. Gordon*, 70 Pa. 474.

the refusal of the bank to honor the check, maintain an action thereon against the bank.²⁵

One of the grounds, upon which the holder of a check has been denied the right to bring an action thereon against the drawee bank, is that there is no privity of contract between the bank and the holder. On principle there can be no foundation for an action against the bank by the holder, unless there is a privity of contract between them.²⁶ A consideration of the nature of the contract between a bank and its customer necessarily leads to the conclusion that the holder of a check has no proprietary interest in the fund on deposit. The relation between the two is that of debtor and creditor, not of agent and principal, or trustee and *cestui que trust*. The bank agrees with its customer to receive his deposits, to account to him for them, to repay them on demand, and to honor his checks when presented; and for any breach of that contract it is liable to him. But the money deposited becomes absolutely the property of the bank, impressed with no trust, and the bank may dispose of it at its pleasure, subject only to its personal

25. *National Bank of the Republic v. Millard*, 10 Wall. (U. S.) 152, 19 L. Ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Florence Mining Co. v. Brown*, 124 U. S. 385, 31 L. Ed. 424; *National Commercial Bank v. Miller*, 77 Ala. 168; *Rogers Commission Co. v. Farmers' Bank*, Ark., 140 S. W. Rep. 992; *Pullen v. Placer County Bank*, 138 Cal. 169, 71 Pac. Rep. 83; *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. Rep. 778; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16, 24 Pac. Rep. 582; *Fulton v. Gesterding*, 47 Fla. 150, 36 So. Rep. 56; *Georgia Seed Co. v. Talmadge & Co.*, 96 Ga. 254, 22 S. E. Rep. 1001; *Love v. Ardmore Stock Exchange*, 5 Ind. Terr. 202, 82 S. W. Rep. 721; *Harrison v. Wright*, 100 Ind. 515; *State v. Bank of Commerce*, 49 La. Ann. 1060, 22 So. Rep. 207; *Moses v. Franklin Bank*, 34 Md. 574; *Carr v. National Security Bank*, 107 Mass. 45; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. Rep. 1119; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *National Bank of New Jersey v. Berrall*, 70 N. J. Law 757, 58 Atl. Rep. 189; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Commercial Nat. Bank v. First Nat. Bank*, 118 N. C. 783, 24 S. E. Rep. 524; *Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank of Sharpsburg*, 220 Pa. 1, 69 Atl. Rep. 280; *Carley v. Potter's Bank*, Tenn., 46 S. W. Rep. 328; *New York Life Ins. Co. v. Patterson & Wallace*, 35 Tex. Civ. App. 447, 80 S. W. Rep. 1058; *Gamer v. Thompson*, 35 Tex. Civ. App. 283, 79 S. W. Rep. 1083; *House v. Kountze*, Tex., 43 S. W. Rep. 561; *Commercial Bank of Tacoma v. Chilberg*, 14 Wash. 247, 44 Pac. Rep. 264.

26. *National Bank of the Republic v. Millard*, 10 Wall. (U. S.) 152, 19 L. Ed. 897.

obligation to the depositor to pay an equivalent sum upon his demand or order. The right of the bank to use the money for its own benefit is the very consideration for its promise to the depositor. The bank makes no agreement with the holders of the depositor's checks, and it is under no direct obligation to them.²⁷

The question as to the rights of the holder of a check against the drawee bank becomes important in many instances, as where the drawer attempts to stop payment, or the deposit has been made the subject of garnishment proceedings after a check has been issued and before its presentment to the bank, or where one of the interested parties becomes insolvent while a check is outstanding. Under the rule that a check does not operate as an assignment it has been held that the holder of a check, not presented for payment until after the failure of the drawee bank, is not entitled to have the check paid out of the dividend assigned to the drawer;²⁸ and where the holder of a check sends it to the cashier of the drawee bank with instructions to apply it to the payment of a note of the holder, not then in the bank, and the bank fails before the check is accepted or applied, the holder is not entitled to be paid from the assets of the bank in preference to the general creditors;²⁹ and it has been held that the drawing of checks upon a general deposit in a bank, prior to the garnishment of the drawer's account, does not exempt an amount equal to such checks, where the latter are not presented until after the service of the writ in garnishment.³⁰ Even though a check is drawn for the precise amount of the drawer's deposit, it is held that the check does not constitute an assignment of the fund.³¹ It is held that there is no assignment of the fund on deposit in favor of the holder of a check, even where the deposit was made for the express purpose of paying the check.³² But, while the mere giving of a check is not sufficient to assign any

27. *Carr v. National Security Bank*, 107 Mass. 45.

28. *State v. Bank of Commerce*, 49 La. Ann. 1060, 22 So. Rep. 207.

29. *Chapman v. White*, 6 N. Y. 412.

30. *Commercial Bank of Tacoma v. Chilberg*, 14 Wash. 247, 44 Pac. Rep. 264; *Kaesemeyer v. Smith*, Idaho, 123 Pac. Rep. 943.

31. *Fulton v. Gesterding*, 47 Fla. 150, 36 So. Rep. 56; *Maginn v. Dollar Savings Bank*, 131 Pa. 362.

32. *Kaesemeyer v. Smith*, Idaho, 123 Pac. Rep. 943.

part of the deposit against which it is drawn, the parties may create an assignment by a clear agreement to that effect, in addition to giving the check, even in those states in which it is ordinarily held that a check does not operate as an assignment.³³ And where an agent deposits in his name in a bank the proceeds of a sale of his principal's property, and delivers a check for the amount to the principal, the bank cannot set up want of privity as against the principal and is liable in an action by him where it refuses to honor the check.³⁴

§5. Where Check is Held to Operate as an Assignment.—In some states it has been held that a check does operate as an assignment, and that the delivery of a check transfers to the holder so much of the deposit as the check calls for and renders the bank liable for that amount to the holder, provided there is on deposit a sufficient amount to pay the check at the time of its presentment.³⁵ This view it is said, is based upon the

33. *Hove v. Stanhope State Bank*, 138 Ia. 39, 115 N. W. Rep. 476; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634.

In the *Yardley* case it was said: "Whilst an equitable assignment or lien will not arise against a deposit solely by reason of a check drawn against same, yet the authorities establish that if, in the transaction connected with the delivery of the check, it was the understanding and agreement of the parties that an advance about to be made should be a charge on and satisfied out of a specified fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice."

34. *Van Alen v. American Nat. Bank*, 52 N. Y. 1, See also *Hemphill v. Yerkes*, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607.

35. *Munn v. Burch*, 25 Ill. 21; *Brown v. Leckie*, 43 Ill. 497; *Brown v. Oakland Nat. Bank*, 131 Ill. App. 61; *National Bank of America v. Banking Company*, 114 Ill. 483; *Brown v. Schintz*, 202 Ill. 509, 67 N. E. Rep. 172; *Rauch v. Bankers' Nat. Bank*, 143 Ill. App. 625; *First Nat. Bank v. Selden*, 120 Fed. Rep. 212, (defining law of Illinois); *Roberts v. Austin Corbin & Co.*, 26 Ia. 315; *Bloom v. Winthrop State Bank*, 121 Ia. 101, 96 N. W. Rep. 733; *Thomas v. Exchange Bank*, 99 Ia. 202; *Chambers v. Northern Bank*, 4 Ky. L. Rep. 1002; *Deatheridge v. Crumbaugh*, 8 Ky. L. Rep. 592; *Farmers' Bank v. Newland*, 17 Ky. L. Rep. 329; *Weiland's Admr. v. State Nat. Bank*, 112 Ky. 310, 65 S. W. Rep. 617; *Commonwealth v. Kentucky D. & W. Co., Ky.*, 116 S. W. Rep. 766; *Columbia Finance & Trust Co. v. First Nat. Bank*, 116 Ky. 364, 76 S. W. Rep. 156; *Rostad v. Union Bank of St. Paul*, 85 Minn. 313, 88 N. W. Rep. 848; *Taylor v. First Nat. Bank, Minn.*, 138 N. W. Rep. 783; *Waggatt v. First Nat. Bank*, 117 Minn. 9, 134 N. W. Rep. 224; *Falls City State*

implied promise of the bank receiving a deposit to pay out the same upon the checks of the depositor.³⁶

Under this doctrine it is held that, where a bank deposit is attached after the delivery of a check and before its presentment, the check holder is entitled to payment from the bank,³⁷ and that the general assignment of the drawer of a check for the benefit of his creditors, made after the delivery of a check, but prior to its presentment, does not invest the assignee with the right to the money represented by the check.³⁸ While the failure to present a check for payment within a reasonable time releases the indorsers from liability, and releases the drawer to the extent of any loss he may have suffered because of the delay, it does not, where a check is held to operate as an assignment, release the drawee bank, provided that there are sufficient funds to pay the check at the time of presentment.³⁹

Notwithstanding the operation of a check as an assignment, a drawee bank, which holds a note of the depositor, may set off

Bank v. Wehrli, 68 Neb. 75, 93 N. W. Rep. 994, *Fonner v. Smith*, 31 Neb. 107; *Guthrie Nat. Bank v. Gill*, 6 Okla. 560, 154 Pac. Rep. 434; *Southern Seating & Cabinet Co. v. First Nat. Bank*, 87 S. C. 79, 68 S. E. Rep. 962; *Turner v. Hot Springs Nat. Bank*, 18 S. D. 498, 101 N. W. Rep. 348; *Pease v. Landauer*, 63 Wis. 20, 22 N. W. Rep. 847.

36. *Roberts v. Austin Corbin & Co.*, 26 Ia. 315.

"A check on a bank in which the drawer has funds on deposit subject to check is an assignment of such funds of the drawer to the amount of the check, which assignment is complete as between the drawer and payee when the check is given, and complete as between the payee or holder and the bank when the check is presented for payment. Upon such presentation the bank, unless its right to pay has been taken away by some occurrence before presentation, is legally bound to pay the check." *Wasgatt v. First Nat. Bank*, 117 Minn. 9, 134 N. W. Rep. 224.

37. *National Bank of America v. Indiana Banking Company*, 114 Ill. 483; *Rostad v. Union Bank of St. Paul*, 85 Minn. 313, 88 N. W. Rep. 848.

Where a check is delivered before the service of process on the drawee bank, at the suit of a creditor of the drawer, the bank may pay the check even after the service of the writ; but the bank is not protected in paying a check delivered after the service of the writ on the bank, as against the garnishing creditor. *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483.

38. *Roberts v. Austin Corbin Co.*, 26 Ia. 315.

39. *Brown v. Schintz*, 202 Ill. 509, 67 N. E. Rep. 172.

such note against the deposit, where it appears that the depositor is insolvent.⁴⁰ The doctrine of assignment applies only to ordinary checking accounts and does not apply to an account where a demand does not entitle the depositor to payment, such as a savings account where the production of a pass book is necessary to secure payment,⁴¹ and it is held, even in those states which subscribe to the general doctrine of assignment, that a check does not assign any part of a deposit, where the check is drawn for an amount greater than the amount on deposit.⁴²

§6. Check as an Assignment Under the Negotiable Instruments Law.—The conflict in the authorities on the question whether a check operates as an assignment has been largely overcome by the Negotiable Instruments Law, which has been adopted in most of the states, and which expressly provides: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."⁴³ The general adoption of this statute has practically abolished the doctrine under which a check operates as an assignment. In some of the few states, in which the uniform statute has not been adopted it is expressly held by judicial decision that a bank check is not an assignment.

§7. When Action on Check is Barred by Statute of Limitations.—It is a general rule that the claim of a depositor against his bank for money on deposit does not accrue until a demand for the deposit has been made. It is therefore generally held that the statute of limitations does not begin to run against such

40. *Thomas v. Exchange Bank*, 99 Ia. 202.

41. *Brown v. Oakland Nat. Bank*, 131 Ill. App. 61.

42. *Henderson v. United States Nat. Bank*, 59 Neb. 280, 80 N. W. Rep. 898; *Coates v. Preston*, 105 Ill. 470.

43. *Neg. Inst. L.*, Sec. 325 of the New York Act.

Among the states, which formerly held a check to work an assignment, and which have adopted the Negotiable Instruments Law, thus changing the rule in their respective jurisdictions, are Illinois, Iowa, Kentucky, Minnesota, Nebraska, South Dakota, Oklahoma and Wisconsin.

a claim until a demand has been made.⁴⁴ This is due to the relation existing between the bank and its depositor. By the deposit the latter parts with, and the former acquires, the title to the specific money deposited, and the one becomes indebted to the other in the amount of the sum deposited. But, by universal understanding, there is a condition attached to the undertaking of the bank. It is not its duty, as it is that of an ordinary debtor, to seek the creditor and pay him. Its engagement is to pay at its banking-house, when payment shall be called for there.⁴⁵ But where a bank notifies its depositor that it has appropriated the deposit or that for some other reason the deposit will not be paid on demand, demand is dispensed with. The statute begins to run immediately and the claim is barred after the elapse of the period provided for in the statute.⁴⁶

The situation is not altered by the fact that there is an outstanding certified check drawn against the account; thus, where a depositor drew his check in March, 1870, which was certified, and on the following day paid on the forgery of the payee's indorsement, which forgery was not discovered by the depositor until January, 1877, at which time the depositor tendered the check to the bank and demanded payment, it was held that the depositor's right of action against the bank was

44. *Merchants' Bank v. State Bank*, 77 U. S. 604, 647; *Wright v. McCarty*, 92 Ill. App. 120; *Citizens' Bank v. Fromholz*, 64 Neb. 284, 89 N. W. Rep. 775; *Branch v. Dawson*, 33 Minn. 399, 23 N. W. Rep. 552; *Viets v. Union Nat. Bank*, 101 N. Y. 563.

45. *Branch v. Dawson*, 33 Minn. 399, 23 N. W. Rep. 552. "The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking-house. It becomes a mere custodian and is not in default of liability to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessarily alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows, that no right of action exists, and the Statute of Limitations does not begin to run until the demand stipulated for in the contract has been duly made." *Girard Bank v. Bank of Penn. Township*, 39 Pa. St. 92.

46. *Mifflin County Nat. Bank v. Fourth St. Nat. Bank*, 8 Pa. Dist. 477, 22 Pa. Co. Ct. 495; *Farmers' & Mechanics' Bank v. Planters' Bank*, 10 Gill & J. (Md.) 422.

not barred by the statute. The cause of action did not accrue until the making of the demand.⁴⁷ The holder of a certified check stands in the same position in this regard as the drawer; that is, the statute does not begin to run as to his claim against the bank until a demand of payment has been made.⁴⁸

When the action is brought by the holder of a check against the drawer, the situation is different; in these cases it is generally held that the statute begins to run against the holder's cause of action upon the lapse of a reasonable time for the presentment of the check.⁴⁹ It is a general rule that the holder

47. *Bank of British No. Am. v. Merchants' Nat. Bank*, 91 N. Y. 106. "In this case a certification did not make the check due without demand. Such a certification simply binds the drawee bank to have and hold sufficient funds to pay the check to one lawfully demanding payment. In other respects it still remains a depositary liable to pay only upon demand. It would be a very inconvenient rule, subversive, it is believed of the usage and contrary to the understanding of bankers, to hold that all certified checks were due and could be sued upon without demand."

48. *Blades v. Grant County Deposit Bank*, Ky. 56 S. W. Rep. 415, *Girard Bank v. Bank of Penn Township*, 39 Penn. State Rep. 92.

49. *Wrigley v. Farmers' etc. Bank*, 76 Neb. 862, 108 N. W. Rep. 132; *Scroggin v. McClelland*, 37 Neb. 644; *Dolan v. Davidson*, 16 Misc. Rep. (N. Y.) 316, 39 N. Y. Supp. 394, Aff'd., 7 N. Y. App. Div. 461; *Brust v. Barrett*, 16 Hun (N. Y.) 409.

New York Statute.—Section 410 of the New York Code of Civil Procedure provides: "When a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time, when the right to make a demand is complete." The statute makes an exception in the case of a deposit of money to be repaid only upon special demand. This section was applied in *Dolan v. Davidson*, 16 Misc. Rep. (N. Y.) 316, where the court said: "I am of the opinion that the statute of limitations has run against this action, both under the ruling of the General Term in *Brust v. Barrett*, supra, on account of failure of the plaintiff's intestate to present the check within six years, and also under Section 410 of the Code, which, I think, should be construed as requiring that the time within which the action must be commenced must be computed from the time when the right to make the demand was complete. The right to make the demand was complete upon delivery of the check, and the holder of a check should not be permitted to postpone indefinitely the liability of the maker, by omitting to present the check for payment."

The Rule in Georgia.—It was held in *Haynes v. Wesley*, 112 Ga. 668, 37 S. E. Rep. 990 that, in an action by the holder against the drawer of a check, the statute runs from the date of presentment and refusal to pay; where presentment is for any reason excused, as where the check is drawn against no funds, presentment is not necessary and the statute runs from the date of check.

of a check, who is in the same place with the bank upon which it is drawn, must present it for payment not later than the following day. His failure to so present the check will discharge the drawer to the extent of any loss he may suffer as the result of such delay, as where the drawee bank fails in the interim.⁵⁰ But where the drawer suffers no loss as a result of the delayed presentment, he is liable to the holder until the claim is barred by the statute. The purport of the decisions is that, in cases of this kind, the statute begins to run against the holder's claim on the day after the check is received by him, and does not depend upon the making of any demand.

§8. Payment by Check.—When, for some reason, a check, delivered in payment of a debt is not paid the question arises whether the delivery of the check operates to discharge the debt. The effect which the check has in this regard depends upon the circumstances surrounding the transaction. In the usual case of this kind the check is regarded as conditional payment only, which becomes absolute upon the payment of the check.⁵¹

Where a debtor delivers to his creditor a check for the amount of his indebtedness, and there is no agreement between the parties that the check is to be taken in complete satisfaction of the debt, and the creditor is not guilty of laches in collecting the check and the paper has not passed out of his control, it is universally held that the delivery of the check does not operate to extinguish the debt, unless the check is paid. In the event that the check is dishonored upon due presentment the creditor may bring his action upon the original indebtedness without resorting to the debtor's liability on the check.⁵²

50. See *infra*, §77.

51. *Cooney v. United States Wringer Co.*, 101 Ill. App. 468; *Interstate Nat. Bank v. Ringo*, 72 Kans. 116, 83 Pac. Rep. 119; *Kelty v. Second Nat. Bank*, 52 Barb. (N. Y.) 328; *Olcott v. Rathbone*, 5 Wend. (N. Y.) 490; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538.

52. *Lowenstein v. Bresler*, 109 Ala. 326; *Henry v. Conley*, 48 Ark. 267; *Heartt v. Rhodes*, 66 Ill. 351; *Sutton v. Baldwin*, 146 Ind. 341; *People's Sav. Bank, v. Gifford*, 108 Iowa 277; *Mullins v. Brown* 32 Kan. 312; *Good v. Singleton*, 39 Minn. 340; *Union Biscuit Co. v. Springfield Grocer Co.* 143 Mo. App. 300, 126 S. W. Rep. 996; *Bradford v. Fox*, 38 N. Y. 289, reversing 39 Barb. (N. Y.) 203, 16 Abb. Pr. (N. Y.) 51; *Holmes v. Briggs*, 131 Pa. St. 233, 17 Am. St. Rep. 804; *Western Brass Mfg. Co., v. Maverick*, 4 Tex. Civ. App. 535, 23 S. W. Rep. 728.

The parties may, of course, enter into an agreement to the effect, that the check is to be received in absolute payment of the debt. Under such circumstances, if the check is not paid, the holder's only right of action against the drawer is on the check. He cannot sue on the original debt.⁵³ And there are circumstances, under which, although there is no agreement or understanding between the drawer and payee, the check will be deemed to have satisfied the obligation for which it was given, notwithstanding the fact that the check is not paid. The negotiation of a check to a third party may result in an extinguishment of the debt for which the check was given. Thus; where the payee of a check indorsed it for value to another and was released from liability because of nonpresentment, it was held that the check was an effective payment of money by the drawer to the payee.⁵⁴ And where the payee of a check has it certified, he not only releases the drawer from all liability on the check, but his act renders the check operative as a payment or discharge of the indebtedness for which it was given.⁵⁵

Laches on the part of a payee in the matter of collecting the check may result in extinguishing the debt for which it was given. A creditor is not bound to receive a check in settlement of an obligation. He may insist upon legal tender, but if he takes a check, he undertakes to do all that the law requires to be done to obtain a payment, and if he fails in the performance of that duty, the drawer is released, both as to liability on the check and his liability on the debt for which the check was given, to the extent of any loss resulting from the creditor's negligence.⁵⁶ Where a check was delivered to the agent of the creditor and the agent wrongfully indorsed and

53. *Strong v. Kling*, 35 Ill. 9; *National Park Bank v. Levy*, 17 R. I. 746; *Cochran v. Slomkowski*, 29 Penn. Sup. Ct. Rep. 385.

Georgia Statute. Section 4314 of the Georgia Code, (1911) provides that "bank checks and promissory notes are not payment until themselves paid." Under this statute, however, a check may operate as payment where there is an agreement between the parties to that effect. *Hatcher v. Comer*, 75 Ga. 728; *Butler, Stevens & Co. v. Barnes*, 8 Ga. App. 513, 69 S. E. Rep. 923.

54. *Brown v. Schintz*, 202 Ill. 509, 67 N. E. Rep. 172.

55. *Scheffenacker v. Hoopes*, Md., 77 Atl. Rep. 130.

56. *Smith v. Miller*, 43 N. Y. 171.

collected the check, it was held that the original indebtedness was extinguished.⁵⁷

57. *McFadden v. Follrath*, Minn., 130 N. W. 542; in this case it was urged that the debtor should be liable to the creditor in his action on the original debt, in as much as he had a valid claim against the bank for the amount of the check, because of its having been paid on a forged indorsement, but, it was held that if either the drawer or payee was to suffer because of the dishonesty of the agent, the loss should fall upon him who appointed the agent and intrusted him with the check.

See *Union Biscuit Co. v. Springfield Grocer Co.*, 143 Mo. App. 300, 126 S. W. Rep. 996 in which the debtor mailed a check to the creditor in settlement of his account, which check the creditor's bookkeeper altered by inserting his own name as payee and collected. It was held in this case, that the check did not operate as payment and that the debtor was still liable to his creditor upon the original debt.

CHAPTER II.

NEGOTIABILITY AND FORM OF CHECKS.

- § 9. Negotiability in General.
- §10. Check Must Be in Writing.
- §11. Signature.
- §12. Checks Signed in Lead Pencil.
- §13. Date.
- §14. Check Must Be Payable to Order or Bearer.
- §15. Drawee.
- §16. Must Be Payable in Money.
- §17. Instruments Payable in Current Funds or Currency.
- §18. Recital of Consideration.
- §19. Check Must Be Unconditional.
- §20. Negotiability of Memorandum Checks.
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§9. Negotiability in General.—While the negotiability of bank checks has been questioned, it is hardly necessary to quote authority for the proposition that checks in proper form are now regarded as negotiable instruments.¹ The negotiable character of a bank check was first judicially established in the year 1764 in the English courts. The facts in the case in which this conclusion was reached were as follows. The defendant Vaughan, a merchant in London, gave a cash-note, as it was then called, to one Bicknell, a ship husband, which note was dated at London, October 22, 1763, and addressed to Sir Charles Asgill, who was Vaughan's banker, and directed him to "pay to the ship Fortune or bearer," a certain amount. Bicknell, by some accident, lost the note. The person who found it took it to the shop of one

1. *Boswell v. Citizens' Sav. Bank*, 96 S. W. Rep. 797. 29 Ky. Law Rep. 988.

In *Famous Shoe and Clothing Co., v. Crosswhite*, 51 Mo. App. 55, it was said that an ordinary check "is not a negotiable instrument in the broad sense which would protect a transferee, when it was found that it had been fraudulently procured. But it is quasi negotiable, like certificates of stock in a corporation, or a certificate of deposit in a bank."

Grant, the plaintiff in the case, and bought five pounds worth of tea. He offered the note in payment and requested the balance over the price of the tea in cash. Grant made inquiry and upon being informed that the drawer, Vaughan, was a man in good financial standing and that the note was in his handwriting, gave the change out of the note retaining the price of the tea. Vaughan, in the meantime, had learned of the loss of the note and sent word to Sir Charles Asgill not to pay it. Whereupon Grant, being refused payment, brought his action against Vaughan. Grant's right to recover, of course, depended upon the negotiability of the instrument. It was held that the "note" was negotiable and that Grant could maintain his action on the theory that "no dispute ought to be made with the bearer of a cash note who comes fairly by it, for the sake of commerce, to which the discrediting of such notes might be very detrimental."

§10. Check Must be in Writing.—It is clearly essential that a check, like any other negotiable instrument, be in writing, for no parol contract could serve the purpose of commercial paper as a convenient transferrable medium of exchange. It is provided by the Negotiable Instruments Law² that an instrument, to be negotiable, must be in writing and signed by the drawer or maker. When money is deposited with a bank, subject to check, it is payable on demand in writing at the bank unless some other agreement has been made with reference to its payment. The bank is not required to hunt up the depositor and pay him the money, as an ordinary debtor is bound to do with his creditor. While the bank may re-pay the money, or transfer it from one account to another on oral order, it is under no obligation to do so but is entitled to a demand in writing, as by a check, receipt or otherwise, as evidence of payment.³ But, where a demand

2. Sec 20 of the New York Act.

3. *McEwen v. Davis*, 39 Ind. 109, *First Nat. Bank v. Stapf*, 165 Ind. 162, 74 N. E. Rep. 987; *Whitsett v. People's Nat. Bank*, 138 Mo. App. 81, 119 S. W. Rep. 999.

In *First Nat. Bank v. Stapf*, 165 Ind. 162, 74 N. E. Rep. 987. it was said: "A proper demand of a bank for money on deposit is made when the depositor during business hours presents or causes to be presented to the bank his check, order, draft, receipt, or other writing for the payment of money in the amount desired, which writing, when honored and in the hands of the bank, will be evidence of the authority and direction of the depositor to pay, as well as evidence of the payment."

would be futile, as where a bank has paid checks drawn by its depositor upon forgeries of the payees' indorsements, and takes the stand that the amount claimed by the depositor is not owing to him, no demand of any sort is necessary. A demand under such circumstances would be an absurd and useless formality.⁴

§11. Signature.—A signature is, of course, essential to the validity of a check. The form of the signature is entirely a matter of arrangement between the bank and the depositor. Where the parties have agreed upon a form of signature the bank is not bound to honor a check drawn upon it by the depositor unless his signature is made in the agreed form. The depositor may bind himself as to other persons by any form of signature which he chooses to place upon his check, and adopt as his own, but if his contract with the bank calls for a signature in a particular form, as it generally does, he must follow that form or the bank may ignore his check.⁵ And, where a bank has agreed to pay a depositor's checks signed in a specified manner it should avoid honoring checks, purporting to be drawn by the depositor, unless the signature is in the form agreed upon.⁶

It is seldom, if ever, that a man would desire to issue his checks with his signature entirely printed, thereon, without the addition of some writing to indicate his adoption of the printed signature. And yet, if he could persuade his bank to honor checks so signed, the signature would be legal and valid. The validity of coupon bonds, signed by a printed fac simile of the maker's autograph, adopted by the maker for that purpose, has been upheld.⁷

4. *Pratt v. Union Nat. Bank*, 79 N. J. Law 117, 75 Atl. Rep. 313.

5. *Traveler's Check*:—A company issuing a traveler's check cannot be compelled to pay it to a transferee, unless it is countersigned by the person to whom it was issued. *Samberg v. American Express Company*, 136 Mich. 639, 99 N. W. Rep. 879. It was here said: "The company has the right to refuse to pay when the check does not bear the countersign agreed upon. The owner of the check also has the right to insist that it shall not be paid when it is not countersigned as agreed."

Voucher Check:—A voucher draft, containing a provision requiring it to be signed in ink is not negotiable where the provision is ignored and the signature is made with a lead pencil. *Val Platz Brewing Co. v. Interstate etc. Co.*, 161 Mo. App. 531, 143 S. W. Rep. 542.

6. Where a bank paid a check on a firm account, not signed in the agreed form, which check was obtained from the drawer by fraud, it was held that the bank was liable to the firm. *Polizzotto v. People's Bank*, 125 La. 770, 51 So. Rep. 843.

7. *Pennington v. Baehr*, 48 Cal. 565

Where several persons who are not partners make a deposit to their joint credit the bank should not in the absence of special agreement, pay any check drawn against the deposit which is not signed by all of the depositors, unless it appears that those not signing have in some way authorized the payment. Thus, where money was deposited by three persons, not partners, the signatures of all being entered in the signature book of the bank in the usual way, and the bank paid checks, on which one signature was genuine and the other two were forged, it was held that the bank was liable to the depositors who had not signed the checks.⁸ When money is deposited in a bank to the credit of a partnership and there is no special agreement as to the form in which checks shall be signed or as to what parties shall have the right to draw against the deposit, the bank is authorized to honor checks drawn by any one of the partners. The signature on a check may be made by a duly authorized agent of the drawer. No particular form of appointment is necessary for this purpose and the authority of the agent may be established as in other cases of agencies.⁹ The agent, in such case, should exercise care not to sign the check in such manner as to render himself personally liable. A proper form for an agent's signature is "B. C., by A. B. Agent." In a case where a check was signed "A. B., Agent," it was held that A. B. was personally liable in case of dishonor.¹⁰ But where a check, having the words "Aetna Mills" printed in its margin, was signed "A. B., Treasurer," it was held that the agency was clearly designated on the face of the instrument and that it was the check of the corporation named in the margin and did not render A. B. personally liable.¹¹

As a general rule the signature of one of several co-executors

8. *Innes v. Stephensen*, 1 Moody & R. (Eng.) 145. See also *Columbia Finance & Trust Co. v. First Nat. Bank*, 116 Ky. 364, 76 S. W. Rep. 156.

9. *Neg. Inst. Law*, Section 38 of the New York Act.

10. *Bickford v. First Nat. Bank*, 42 Ill. 238.

11. *Carpenter v. Farnsworth*, 106 Mass. 561. In regard to the liability of a person signing a negotiable instrument as agent, Section 39 of the Negotiable Instruments Law, (N. Y. Act) provides as follows: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

on a check is sufficient authority to the bank to pay it, although it has been held in a Pennsylvania case that "all must unite in the receipt or check in order to discharge the banker."¹² The rule in regard to co-trustees is different. It is generally held that the signatures of all are necessary for the validity of a check. In an English case it was said: "One executor can do any action; but this is not so as to trustees. I do not think the signature of one trustee sufficient."¹³

§12. Checks Signed in Lead Pencil.—Since it is ordinarily held that the validity of a contract is not affected by the fact that the signature is written with a lead pencil,¹⁴ and has been specifically held that the indorsement of a promissory note in lead pencil is valid,¹⁵ there is no reason for believing that a bank check may not be written or signed in lead pencil without affecting the validity of the instrument. While the question does not appear to have been decided it would seem that a bank would be upheld in refusing to honor a check so written and signed, because of the

12. *De Haven v. Williams*, 80 Pa. 480. In this case the Court said: "The authorities agree that money which has been received by a co-executor should be deposited to the joint account; and if this precaution is not observed and a loss ensues through the fraud of him who is intrusted with the fund, a chancellor will visit the consequences on both. Under these circumstances, they are still executors, but executors charged with a fiduciary obligation which renders them virtually trustees as regards the assets which they have received and hold in common. The existence of such an obligation implies the power to fulfill it. It were futile to open a joint account if one of the depositors could withdraw the money."

13. *Ex. Parte Rigby*, 19 Ves. Jr. (Eng.) 462.

14. *Drefahl v. Rabe*, 132 Iowa 563; *Porter v. Valentine*, 41 N. Y. Supp. 507.

15. *Geary v. Physic*, 5 B. & C. (Eng.) 234. "There being no authority to show that a contract, which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law merchant requiring only that the indorsement of bills of exchange should be in writing, without specifying the manner in which the writing is to be made, I am of opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law merchant and that the property in the bill passed by it to the indorsee." Lead pencil indorsements have been declared valid in *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, and in *Closson v. Stearns*, 4 Vt. 11, the court in the latter case saying: "Although it may be imprudent and unsafe in many cases to rely on a writing made with a pencil, yet the authorities show clearly that such writing has been recognized as legal."

facility with which such a check might be altered, at least for a time sufficient to enable it to make necessary inquiries as to the authenticity of the instrument.

§13. Date.—The validity and negotiable character of a check is not affected by the fact that it bears no date.¹⁶ When an undated check is issued the holder has *prima facie* authority to complete the instrument by filling in the date. If an improper or unauthorized date is written into the check and the check is negotiated to a holder in due course, the date inserted will be regarded as the true date.¹⁷

The postdating of checks is frequently indulged in, especially by those whose deposit is insufficient to pay the check at the time of its delivery, but who intend to deposit an amount large enough to meet the check before the time of its date arrives. Checks of this kind have often been held to be valid by the courts, provided the postdating is not done for a fraudulent purpose.¹⁸ Furthermore, the postdating of a check has no effect on its negotiability.¹⁹ A postdated check may be transferred in the same manner and with the same rights as other checks, except that the holder is not entitled to present it or demand payment until the day of its date. The fact that a check is postdated casts no suspicion on it and the transferee is not called upon to make inquiries.²⁰

§14. Check Must Be Payable to Order or Bearer.—To be negotiable a check must be payable to order or to bearer. This is so provided in the Negotiable Instruments Law.²¹ The words "or order," "or bearer" and "bearer" on a check, or other in-

16. *Crawford v. West Side Bank*, 100 N. Y. 50. Neg. Inst. L., §25 of the N. Y. Act.

17. Neg. Inst. L., §33 of the N. Y. Act.

18. *Almich v. Downey*, 45 Minn. 460; *Burns v. Kahn*, 47 Mo. App. 215; *Brewster v. McCardel*, 8 Wend (N. Y.) 478; *Albert v. Hoffman*, 117 N. Y. Supp. 1043, 64 Misc. Rep. (N. Y.) 87; *Crawford v. West Side Bank*, 100 N. Y. 50. Neg. Inst. L. §31 of the N. Y. Act: "The instrument is not invalid for the reason only that it is antedated or postdated provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires title as of the date of delivery."

19. *Symonds v. Riley*, 188 Mass. 470, 74 N. E. Rep. 926; *Burns v. Kahn*, 47 Mo. App. 215.

20. See *infra*, Holders in Due Course.

21. Neg. Inst. Law, § 20, subd. 4, of the N. Y. Act.

strument for the payment of money are words of negotiability without which, or other equivalent words, the instrument will not possess that quality. Thus an instrument payable to a designated person without the words "or order" is not negotiable.²² That there may be no doubt as to what constitutes an instrument payable to order it is provided in the statute that an instrument is "payable to order where it is drawn payable to the order of a specified person or to him or his order."²³

Where an instrument is payable to order it is not necessary that the payee be actually named; it is sufficient if he is indicated with reasonable certainty.²⁴ An instrument may be payable to the holder of an office for the time being, as, for instance, to three persons as trustees of an incorporated association or their successors in office.²⁵

Before the adoption of the Negotiable Instruments Law the decisions were in conflict as to whether an instrument, payable to one of several persons, was negotiable. In some of the states it was held that a note payable alternatively to A or B was non-negotiable.²⁶ It is now provided by the Negotiable Instruments Law that an instrument may be payable to "two or more payees jointly," or it may be made payable to "one or some of several payees."²⁷ An instrument payable to "John Smith, Bearer," is payable to John Smith only and is not negotiable.²⁸ A check payable to "the order of bearer, B C" is not payable

22. *Gilley v. Harrell*, Tenn., 101 S. W. Rep. 424; *Fulton v. Varney*, 117 N. Y. App. Div. 572; *Westberg v. Chicago Lumber Co.*, Wis., 94 N. W. Rep. 572.

23. Neg. Inst. Law, § 27, of the N. Y. Act.

24. *Adams v. King*, 16 Ill. 169, where it was held that a note payable to the order of "the administer of Abner Chase," was negotiable.

25. *Davis v. Garr*, 6. N. Y. 124.

26. *Walrad v. Petrie*, 4 Wend. (N. Y.) 575; *Blanchenhogen v. Blundell*, 2 B. & Ald. (Eng.) 418.

In *Musselman v. Oakes*, 19 Ill. 81, where the action was upon a note payable to "Oliver Fletcher or R. H. Oakes, administrators," it was said: "The instrument sued on was payable in the alternative to one of two persons, and for that reason is not a promissory note and cannot be sued on as such. * * * Here the promise was to pay Fletcher or Oakes; but which, is uncertain; which of them had the right to receive the pay is not specified, and the legal right to the money is not vested in either."

27. Neg. Inst. Law, § 27, of the N. Y. Act.

28. *Warren v. Scott*, 32 Iowa 22.

to bearer but is payable to the order of B C and may not be negotiated without his indorsement.²⁹

When the space in the check intended for the name of payee, is left blank the instrument is in effect payable to bearer.³⁰ In such a case the holder of the check has *prima facie* authority to complete it by filling in the blank space.³¹ A check is likewise considered as being payable to bearer where it is made payable to the order of a fictitious person; it is said that inasmuch as title to such an instrument cannot be given by indorsement it is, in contemplation of law, a bearer instrument.³² So a check payable to the order of "bills payable," or to the order of "1658." is payable to bearer.³³

A check, however, must make some provision for a payee. If no payee is named and it appears that the drawer intended that it should not be payable to bearer and that no name should thereafter be written in as payee, the instrument is defective and is not a valid check.³⁴ A check payable to the order of "On sight" was held to be without a payee, and therefore defective, and it was determined that the purchaser of such a check could

29. *Bloomington v. National Butchers' & Drovers' Bank*, 33 Misc. Rep. (N. Y.) 594, 66 N. Y. Supp. 35.

30. *Rich v. Starbuck*, 51 Ind. 87.

31. *Neg. Inst. L.*, §33 of the New York Act.

"Where a blank is left in a bill or note for the name of the payee, there is an implied authority to the holder to fill up the instrument, and make it in fact what it was designed to be." *Rich v. Starbuck*, 51 Ind. 87.

32. *Willets v. Phoenix Bank*, 2 Duer, (N. Y.) 121. "A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to "bills payable" or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words "or order" indicates an intention that the paper shall be negotiable; and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement—that is, that it shall be payable to bearer. So when a bill, note or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a bona-fide holder may then recover it." *McIntosh v. Lytle*, 26 Minn. 336.

33. *Willets v. Phoenix Bank*, 2 Duer, (N. Y.) 121; *Mechanics' Bank v. Straiton*, 3 Abb. Ct. of App. Dec. (N. Y.) 269.

34. "Where a bill or note is payable otherwise than to bearer, there being no blank left for the name of the bearer, it must contain the name of the payee." *Rich v. Starbuck*, 51 Ind. 87.

not hold the drawer liable thereon.³⁵ This case is to be distinguished from one in which an impersonal payee is named, such as a check payable to "cash," or bills payable." While it might be claimed that the words "on sight" indicated an impersonal payee, they were in this case clearly inserted, not for the purpose of designating a payee, but for the purpose of fixing the time of payment.³⁶ In a case where the drawer of a check, drawn on an ordinary check blank, drew a line through the space intended for the payee's name, it was held that, the instrument being incomplete for want of a payee, the drawee bank had no authority to pay it and that the bank, having paid the check, was liable to the drawer for the amount.³⁷

§15. Drawee.—It is held that the drawer of an instrument, in which no drawee is named, is liable thereon as on a promissory note.³⁸ In a prosecution for forgery it was held that a check, dated at Virginia, Nevada, and drawn on the "Agency of the Bank of California," where the bank had an agency at Virginia City for the receipt of deposits and the payment of checks, was

35. *McIntosh v. Lytle*, 26 Minn. 336. In *Gibson v. Minet*, 1 H. Bl. (Eng.) 618, it was said: "If I put in writing these words: 'I promise to pay £500 on demand, value received,' without saying to whom, it is waste paper. If I direct another to pay £500 at some day after date, and not say to whom, it is waste paper."

36. "The drawer undoubtedly meant to draw a check, but having left out the payee's name without inserting in lieu thereof words indicating the bearer as payee, it is as fatally defective as it would be if the drawee's name were omitted." *McIntosh v. Lytle*, 26 Minn. 336.

37. *Gordon v. Lansing State Savings Bank*, 133 Mich. 143, 94 N. W. Rep. 741. This was an action on a check wherein the drawer had drawn a line through the space provided for the payee's name. In the opinion it was said: "Not only did Mr. Gordon (the drawer) fail to insert the name of a payee, or to leave a blank where the name of a payee might be inserted but he did more; he drew a line through the blank space, making it impossible for anyone else to insert therein a name, indicating very clearly that he not only declined to name a payee but intended to make it impossible for anyone else to do so."

38. *Almy v. Winslow*, 126 Mass. 342; *Petillon v. Lorden*, 86 Ill. 361; *Brooks v. Brady*, Admr., 53 Ill. App. 155; *Bradley v. Mason*, 6 Bush 602; *Bunting v. Mick*, 5 Ind. App. 289.

The contrary rule is expressed in *Watrous v. Halbrook*, 39 Tex. 572; *Ball v. Allen*, 15 Mass. 433. It was held in these cases that the drawer incurred no liability whatever on an instrument in which no drawee was named.

not open to the objection that it lacked a sensible drawee.³⁹ It is provided in the Negotiable Instruments Law that, where an instrument is addressed to a drawee, the instrument is not negotiable unless the drawee is named or otherwise indicated with reasonable certainty.⁴⁰

§16. Must Be Payable in Money.—Under the law merchant a bill or note, to be negotiable, had to be payable in money and this requirement is continued by the Negotiable Instruments Law. A check, or other instrument, however, does not lose negotiability because it specifies a particular kind of current money out of which payment is to be made.⁴¹ Thus an instrument, payable in "pounds sterling,"⁴² or in "gold dollars,"⁴³ is payable in money and negotiable, while one payable "in New York funds or their equivalent,"⁴⁴ or one which calls for the payment of "an ounce of gold,"⁴⁵ lacks negotiability for the reason that it is not payable in money.

The term "money" is thus defined by the Supreme Court of Wisconsin: "Money is a generic and comprehensive term. It is not a synonym of coin. It concludes coin, but it is not confined to it. It includes whatever is lawfully, and actually current in buying and selling, of the value and as the equivalent of coin.

39. *State v. Cleavland*, 6 Nev. 181.

40. Negotiable Instruments Law, Section 20 New York Act. This section was applied in the case of *Aurora State Bank v. Hayes—Eames Elevator Co.*, 88 Neb. 187, 129 N. W. 279.

41. Sec. 20 of the New York act provides: "An instrument, to be negotiable, must * * * contain an unconditional promise to pay a sum certain in money." Section 25 provides that the negotiability of an instrument is not impaired by the fact that it "designates a particular kind of current money in which payment is to be made."

It is held that a certificate of indebtedness, issued by a county, payable in New York or Chicago Exchange is negotiable under the provisions of the Negotiable Instruments Law. In this regard there is no distinction between an instrument payable in and one payable with exchange. *Security Trust Co. v. Des Moines County*, 198 Fed. Rep. 331.

42. *King v. Hamilton*, 12 Fed. Rep. 478.

43. *Chrysler v. Renois*, 43 N. Y. 209.

44. *Hasbrook v. Palmer*, Fed. Cas. No. 6,188. Such an instrument is not negotiable for the reason that "the term 'New York funds' it is presumed, may embrace stocks, bank notes, specie, and every description currency which is used in commercial transactions."

45. *Roberts v. Smith*, 58 Vt. 492, 4 Atl. Rep. 709.

By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank notes lawfully issued, actually current at par in lieu of coin, are money. The common term paper money is in a legal sense quite as accurate as the term coined money."⁴⁶

Furthermore a bank is not obliged to pay a check drawn upon it when the check is payable in anything but money, unless it agrees with the customer to make payment in some other mode. Thus, a bank is under no obligation to pay a check made payable in Chicago Exchange. Whether a bank will give exchange upon a request contained in a check, in the absence of an agreement to that effect, is optional with the bank.⁴⁷

§17. Instruments Payable in "Current Funds" or "Currency."—As stated in the preceding section commercial paper, including checks, to be negotiable, must be payable in money, but may, without impairing their negotiability, designate a particular kind of current money in which payment is to be made. There has always been a conflict among the decisions as to the negotiability of an instrument payable in "current funds," or in "currency." The difference of opinion has resulted largely from the fact that the courts have placed different constructions upon these terms in determining whether or not they contemplate lawful money. The different character and condition of the currency before and after the Civil War has also had its effect upon these decisions.

Prior to the civil war the paper circulating medium was not all at par with gold or specie. It was largely made up of depreciated bank currency, bills issued by various banks and of uncertain value. Owing to the bad condition of the currency business men, in order to carry on their transactions, were compelled to take, as representing the obligations of their debtors, instruments not payable simply in "dollars" which would mean gold or its equivalent, but in a variety of paper substitutes, for the most part issued by banks, some of local, some of more general circulation. After the war the character of the currency became

46. *Klauber v. Biggerstaff*, 47 Wis. 551. In this case a certificate of deposit payable in currency was held to be payable in money and negotiable.

47. *Hogue v. Edwards*, 9 Ill. App. 148.

largely changed and improved. The state bank currency was taxed out of existence. The national bank currency took its place. The United States notes, upon being declared legal tender, constituted a new form of paper currency, depreciated for a while, but now as good as gold. As a result of this improvement in the currency checks and other instruments, payable in current funds, currency, etc., are less frequently met with than in the days before the war.

The courts which have held bank checks and other instruments of the kind under discussion to be non-negotiable have done so on the theory that the terms "currency" and "current funds" mean something other than lawful money.⁴⁸ In 1842 the Supreme Court of Missouri, holding a draft payable in currency to be non-negotiable, said "At the date of this bill currency was not regarded as cash by the community. In framing their notes and bills the word was adopted with the express view of preventing a demand for cash or specie. The word 'currency' was introduced in the sense in which it is understood after we were afflicted with a depreciated currency, and to prevent a demand for lawful money. Experience has taught us that there is a wide difference between the currency contemplated by the law and the actual currency. The parties must have had these considerations in their minds otherwise they would not have deviated from the usual course of framing such instruments, but would simply have made the bill payable in dollars."⁴⁹

48. *Mobile Bank v. Brown*, 42 Ala. 108; *Johnson v. Henderson*, 76 N. C. 277; *Texas L. & C. Co. v. Carroll*, 63 Tex. 48.

A cashier's check payable in current funds is not negotiable. *Dille v. White*, 132 Ia. 327, 109 N. W. Rep. 909.

A check payable in current bank notes is not negotiable. *Little v. Phenix Bank*, 2 Hill (N. Y.) 425.

A certificate of deposit payable in current funds is not negotiable. *National State Bank v. Ringel*, 51 Ind. 393. "It is not payable in money. It is payable in current funds. This takes from it the character of a negotiable promissory note."

A certificate of deposit payable in currency is not negotiable. *Huse v. Hamblin*, 29 Ia. 501. "The instrument most evidently is not payable in coin, nor in notes of the United States which are made legal tender for all debts. Some other medium of circulation is described by the word 'currency.' We cannot judicially know, and the record is silent upon the point, that the paper is payable in a circulating medium which, under any law or custom, is considered as money or as equivalent thereto."

49. *Farwell v. Kennett*, 7 Mo. 595.

On the other hand the decisions holding that instruments payable in currency or current funds are negotiable do so on the theory that these terms mean legal tender and nothing else, or that while these terms comprehend non-legal tender currency the latter is money within the requirements of negotiability.⁵⁰ The Supreme Court of the United States, in 1887, holding a bank check, payable in current funds, to be a negotiable instrument, said "Undoubtedly it is the law that, to be negotiable, a bill, promissory note or check, must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn and payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money has been held to destroy their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of these words."⁵¹

The provisions of Negotiable Instruments Law do not affect the question of the negotiability of an instrument payable in currency or current funds. The statute declares that an instru-

50. *Lacy v. Holbrook*, 4 Ala. 88; *Swift v. Whitney*, 20 Ill. 144; *Telford v. Patton*, 144 Ill. 611; *Phelps v. Town*, 14 Mich. 374; *Butler v. Paine*, 8 Minn. 324; *Frank v. Wessels*, 64 N. Y. 155; *Howe v. Hartness*, 11 Ohio St. 449.

A check payable in current funds is negotiable. *Laird v. State*, 61 Md. 309. "The words 'current funds' as used in this paper before us mean nothing more nor less than 'current money.'"

A certificate of deposit payable in "current funds on the return of this certificate properly indorsed," is negotiable. *Pomeroy Nat. Bank v. Huntington Nat. Bank*, W. Va., 79 S. E. Rep. 662. "A promise to pay in such funds is construed to be one to be paid in lawful money, convertible into specie or circulating at par with it, in the absence of proof of use of the terms in some other sense."

51. *Bull v. First Nat. Bank*, 123 U. S. 105.

ment to be negotiable, must be payable in money. It permits a negotiable instrument to designate a particular kind of current money in which payment is to be made,⁵² but it does not define the term "money," nor does it contain any guide as to the meaning of the terms, current funds and currency. In a comparatively recent decision by the Supreme Court of Iowa, made since the adoption of the Negotiable Instruments Law in that State, it was held that a cashier's check payable in current funds was not negotiable. No reference was made in the opinion to the statute which seems to indicate that the court did not believe that the law had been affected in this regard by the act.⁵³ Consequently the question of the negotiability of instruments of this kind depends upon the jurisdiction in which the question arises and the construction which the court places upon the terms currency and current funds.

§18. Recital of Consideration.—It is not necessary that a check contain any words indicating that it was given for a consideration. The words "value received" are no more necessary in a check than in any other negotiable instrument. These words express only what the law must imply, from the very nature of the instrument. However essential they may once have been thought to be, at common law they were not necessary. All commercial paper, at common law, implies a consideration though none be expressed by the words "value received" or other words.⁵⁴

But, while no recital of consideration is necessary, a statement in a check indicating the consideration for which it is given, or the account against which it is to be charged, or the transaction out of which the check arose, does not render the instrument conditional or otherwise affect its negotiability.⁵⁵ Thus a check, signed in the name of a corporation bearing the printed words,

52. Sections 20 and 25 of the New York Act.

53. *Dille v. White* 132 Ia. 327, 109 N. W. Rep. 909.

54. *Clarke v. Marlow*, Mont., 50 Pac. Rep. 713.

The Negotiable Instruments Law, § 25 of the New York Act, provides: "The Validity and negotiable character of an instrument are not affected by the fact that * * * it does not specify the value given, or that any value has been given therefor."

55. *Ridgely Nat. Bank v. Patton & Hamilton*, 109 Ill. 479. The following instrument was held to be a valid check: "The Ridgely National Bank, Springfield, Illinois: Pay to Patton & Hamilton, for account of

"This check may not be paid unless object for which drawn is stated," and the written memorandum, "For Wilkes," Wilkes being the agent who signed the check in behalf of the corporation was held to be a valid bank check. The words, "For Wilkes," it was held, indicating nothing more than the consideration for which the check was drawn, or the account to be charged with the amount.⁵⁶

There is a distinction, however, between a check which indicates the account to be charged with the amount and one which directs payment to be made out of a particular fund. A check, which indicates a particular fund out of which payment is to be made, is conditional and, therefore, not negotiable.⁵⁷

§19. Check Must Be Unconditional.—One of the essentials of a negotiable check is that it be payable without condition.⁵⁸ A check, which directed the payment of a certain sum of money, "provided the receipt at the foot hereof is duly signed, stamped and dated" was held to be conditional and, therefore, not negoti-

Lewis Coleman & Co., or order, ten hundred eighteen 23/100 dollars.
\$1018.23

Kimber Ragsdale & Co."

It appeared that the drawers delivered the above check to Patton & Hamilton who were attorneys at law in payment of a claim owed by Lewis Coleman & Co. The court said: "We do not perceive that the presence of the words above named in the check detracts from its quality as such. They introduce nothing of contingency or uncertainty with respect to the payment, the sum payable, or the person to whom it is to be paid. It still remains an order, in all its absoluteness, for the payment of a certain sum of money, to the payees named, and is payable instantly on demand. The words 'for account of Lewis Coleman & Co.,' would seem to have been inserted for the convenience of the drawers, to show the purpose for which the check was given, or to show the equitable interest of Lewis Coleman & Co."

56. *Brown v. Cow Creek Sheep Co.*, Wyo., 126 Pac. Rep. 886.

57. The Negotiable Instruments Law, § 22 of the New York Act, provides as follows:

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional."

58. Negotiable Instruments Law, § 20, N. Y. Act.

able.⁵⁹ But a check was held to be negotiable notwithstanding these words "The receipt at back hereof must be signed, which signature will be taken as an indorsement of the cheque." The court said that the order to pay was unconditional; for, while the words in question were imperative in form, they were not addressed to the bankers and did not affect the nature of the order to them.⁶⁰ And a check was held not to be conditional although this statement was printed upon its face "This check may not be paid unless the object for which drawn is stated." These words did not make the check payable on a contingency. They merely required the check to bear a statement of the object for which it was drawn, in order that it might take effect as a valid obligation.⁶¹ A check may be issued in duplicate. The practise of making instruments in duplicate is generally confined to foreign bills of exchange, but the issuance of a check in duplicate does not render the instrument conditional.⁶²

§20. Negotiability of Memorandum Checks.—A memorandum check, that is a check bearing the word "memorandum" across its face, or inscribed with an abbreviation of that word, is nevertheless negotiable.⁶³ Inscribing a check in this manner has the effect, according to some of the authorities, of dispensing with the necessity of presentment for payment while, according to others, a memorandum check is merely one which is not intended for immediate presentment.⁶⁴

§21. Negotiability of Metal Checks.—Metal checks which are sometimes issued by employers of large numbers of workmen to their employees, representing wages due or about to become due to the employees, and intended to be used by the employees in the purchase of supplies at a store owned and operated by the employer are not negotiable instruments.⁶⁵ Where there is an

59. *Bavins v. Bank*, 1 Q. B. Div. (Eng. 1900) 270; See also *Bank v. Gordon*, 86 L. T. Rep. (Eng.) 574.

60. *Nathan v. Ogdens, Limited*, 93 L. T. Rep. (Eng.) 553.

61. *Brown v. Cow Creek Sheep Co., Wyo.*, 126 Pac. Rep. 886.

62. *Merchants' Nat. Bank v. Ritzinger*, 118 Ill. 484, 8 N. E. Rep. 834.

63. *Dykers v. Leather Mfrs. Bank*, 11 Paige (N. Y.) 612.

64. See *infra*, Presentment for Payment, §66.

65. *Attoyac River Lumber Co. v. Payne*, 57 Tex. Civ. App. 327, 122 S. W. Rep. 278.

understanding and agreement on the part of the employee, to whom such checks are issued, that they are to be payable only in merchandise, one who receives them by assignment from the original holders cannot recover the amount specified in them from the employer without first having demanded payment of the employer in merchandise.⁶⁶

Where, however, the holder of such checks by assignment has demanded payment in merchandise, and his demand has been refused, he may recover the amount represented by them from the party by whom they were issued. The redemption of such checks by the employer at a discount of ten per cent, is a violation of a constitutional provision to the effect that wage earners shall be paid for their labor in lawful money.⁶⁷

66. *Attoyac River Lumber Co. v. Payne*, 57 Tex. Civ. App. 327, 122 S. W. Rep. 278.

67. *Kentucky Coal Mining Co. v. Mattingly*, Ky., 118 S. W. Rep. 350.

CHAPTER III.

DELIVERY.

- §22. What Constitutes Delivery.
- §23. Delivery of Check by Mail.
- §24. Delivery of Check on Sunday.
- §25. Presumption of Delivery.
- §26. Conclusive Presumption of Delivery.
- §27. Incomplete Instrument Filled Out and Negotiated without Delivery.
- §28. Presumption Against Delivery.

§22. What Constitutes Delivery.—The delivery of a check means the transfer of its possession, actual or constructive, from one person to another, with intent to transfer the title thereto. Delivery is the final step essential to the inception of a check as a binding contract. Every contract on a negotiable instrument is incomplete and revocable until the delivery of it for the purpose of giving it effect. The mere drawing of a check, which the drawer retains in his possession, forms no contract and no person can gain an enforceable right therein until it has been actually delivered by the drawer, or by some one acting in his behalf. There are, however, certain instances in which, although there has been no actual delivery, there are facts present which warrant a presumption of delivery.¹ In order to constitute a complete and valid delivery both parties must join in the transaction. The mere leaving a check on the desk of the clerk of the party for whom the check was intended without the clerk's knowledge does not constitute a delivery.²

Where the drawer of a check dies before it has been delivered to the payee the instrument becomes a nullity and it cannot thereafter be delivered by his representatives so as to make it

1. See *infra*, §25, 26.

2. *Kinne v. Ford*, 52 Barb. (N. Y.) 194.

a binding obligation.³ The delivery of a check by the drawer to his agent, for the purpose of being delivered to the payee, does not constitute a delivery to the payee. This was held in a case where the holder of an endowment policy applied to the company by which it was issued for a loan thereon. The company handed the check in question to its agent, who induced the payee to indorse it in the belief that he was signing a voucher, cashed the check and absconded with the proceeds. It was held that there had been no valid delivery to the payee, that there had been no payment by the company to him and that he was therefore entitled to the return of his policy and to have the note, which he had given for the loan, delivered up and cancelled.⁴

§23. Delivery of Check by Mail.—Since title passes to the payee of a check at the moment when it is delivered to him, it sometimes becomes important to know when delivery actually occurs. In the ordinary case delivery is accomplished when the payee obtains physical possession of the instrument. When the check is sent to the payee by mail the rule is that title to the check passes to the payee and there is a complete delivery of the check at the time of mailing, if the check was mailed by the drawer at the direction of the payee, or in response to his request.⁵ But, where the check is mailed by the drawer at his own instance, and not at the request of the payee, the title remains in the drawer during transmission, and there is no delivery of the check until it is received by the payee.⁶

Thus it was held that, where a check was mailed by the drawer to the payee, and it did not appear that the mailing was at the instance of the payee, title remained in the drawer and the fund represented by the check was subject to garnishment in the hands of the drawer by a creditor of the payee, the summons in garnishment having been served upon the drawer before the

3. *Drum v. Benton*, 13 App. D. C. 245.

4. *Barry v. Mutual Life Ins. Co.*, 211 Mass. 306, 97 N. E. Rep. 779.

5. *Buehler v. Galt*, 35 Ill. App. 225; *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85; *Graves v. American Exchange Bank*, 17 N. Y. 205; *Kirkman v. Bank of America*, 42 Tenn. 397.

6. *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 66 Pac. Rep. 326; *Buehler v. Galt*, 35 Ill. App. 225. See also *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295.

check had left the post office at which it was mailed.⁷ And where the drawer of a check had it certified and deposited it in the mail, addressed to the payee, and in some way obtained possession of the check again and had it cancelled by the certifying bank, which had no knowledge of what had been done with the check after its certification, it was held that there had been no delivery of the check and that, therefore, the payee named in the check had no claim against the bank.⁸

§24. Delivery of Check on Sunday.—At common law judicial proceedings were prohibited on Sunday, but the making of contracts was lawful and a person might legally draw, make, indorse, accept or deliver checks or other negotiable instruments on that day.⁹ But, in many of the United States, statutes have been adopted, which have been construed by their courts as having the effect of annulling any contract executed and delivered on Sunday, on the ground that such statutes prohibit the making of all contracts on that day, and that contracts entered into on that day are, therefore, null and void.¹⁰

Since it is the act of delivery that completes and gives life to a contract, a negotiable instrument, delivered on a business day, is valid and enforceable though dated and signed on Sunday.¹¹ And parol evidence is admissible to show that, notwithstanding the fact that a negotiable instrument is dated on Sunday, it was actually delivered on another day.¹² On the other hand, if the instrument bears the date of a business day, parol evidence is competent to establish that the delivery thereof took place on Sunday.¹³ The fact that a negotiable instrument was made and delivered on Sunday cannot be used as a defense by an indorser of the instrument, whose contract of indorsement was entered into on a day other than Sunday.¹⁴

7. *Watt-Harley-Holmes Hardware Co. v. Day*, 1 Ga. App. 646, 57 S. E. Rep. 1033.

8. *Beuhler v. Galt*, 35 Ill App. 225.

9. *Merritt v. Earle*, 29 N. Y. 115.

10. *Hooks v. State*, 58 Fla. 57.

11. *Conrad v. Kinzie*, 105 Ind. 281; *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. Rep. 909.

12. *Trieber v. Commercial Bank*, 31 Ark. 128.

13. *Allen v. Deming*, 14 N. H. 133.

14. *Prescott Nat. Bank v. Butler*, 157 Mass. 548, 32 N. E. Rep. 909.

§25. Presumption of Delivery.—It is not necessary that the holder of a check, in bringing an action thereon, establish in the first instance by positive proof that the check was properly delivered by the drawer, in order to recover. When a person's signature appears on a check, and the check is no longer in his possession, the law presumes a valid and intentional delivery by him.¹⁵

As between the immediate parties to the check, that is in action brought by the payee against the drawer, or in an action by a remote party other than a holder in due course, this presumption of a valid delivery may be rebutted. The drawer may show, by way of defense, that there was no valid delivery. The burden is, of course, upon the drawer to completely establish want of proper delivery. In an instance where the drawer failed to make out this defense, the action was brought by the payee of a check, who was a physician, after the death of the drawer. In an attempt to defend on the ground that there had been no delivery, the administrator showed that the check was in the writing of the payee and that the decedent was accustomed to have about him checks signed in blank. From this it was argued that the payee might have surreptitiously obtained a check signed in blank and filled it in. But it was held that this evidence was not sufficient to establish want of delivery and that the payee was entitled to recover under the provision of the Negotiable Instruments Law, to the effect that a valid and intentional delivery is presumed in such a case until the contrary is proved.¹⁶

When the action is between the immediate parties the drawer may show that the delivery was conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. A Minnesota case illustrates this principle. One McIntyre, having entered into an agreement with a party named Hoit to purchase certain land, drew a check, payable to the firm of which Hoit was a member, and gave it to his lawyer, with instructions to deliver it to Hoit as soon as the contract was properly executed. The contract was signed by another member of the firm, acting without authority and the lawyer thereupon handed over the check. In an action

15. Neg. Inst. L., §35 of the N. Y. Act.

16. *Moak v. Stevens*, 45 Misc. Rep. (N. Y.) 147, construing §35 of the New York statute.

brought against McIntyre by the payee firm, it was held that the handing over of the check by the lawyer, contrary to instructions, was not in law a valid delivery of the same and that the check was without consideration and unenforceable.¹⁷

§26. Conclusive Presumption of Delivery.—But, while in an action brought by the payee of a check, or an action by a remote party other than a holder in due course, the presumption of a valid delivery may be rebutted, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all prior parties prior to him, so as to make them liable to him, is conclusively presumed. This is the provision of the Negotiable Instruments Law,¹⁸ and it changed the law in some of the states. In certain instances, prior to the adoption of the statute, it has been held that an instrument, which has never been delivered by the maker or drawer, has no legal existence as negotiable paper, and that the party, against whom it is sought to be enforced, may always, unless estopped by his own negligence, successfully defend on the ground that there has been no delivery, without regard to the time or circumstances under which it was acquired by the holder.

Under the law, as settled by the statute, a man may draw his check in complete form and leave it upon his desk. It may be blown from the window and picked up on the street, or a thief may enter and carry it off. There is no actual delivery in such a case. But, if the check happens to be drawn payable to bearer, so that it may be disposed of without forging the payee's indorsement, and it is negotiated to a holder in due course, or is paid by the drawee bank without negligence, a valid delivery is conclusively presumed and the drawer will be held liable. And if the check is payable to order and is stolen by the payee, indorsed by him, and negotiated to a holder in due course, the

17. *Hoit v. McIntire*, 50 Minn. 466. See also *Shulman v. Damico*, 115 N. Y. Supp. 90, in which it was held that, where the defendant gave a check to the plaintiff as a deposit upon a conditional contract for the purchase of fixtures, it being understood that if a certain other furnished the fixtures there was to be no contract therefor with the plaintiff, and the defendant notified the plaintiff that the fixtures had been furnished by the other party, the plaintiff could not enforce the check against the defendant.

18. §35 of the N. Y. Act.

holder will be entitled to recover, notwithstanding the absence of an actual delivery.¹⁹

This rule of conclusive presumption of delivery operates in favor of a holder in due course of a check, which was originally delivered by the drawer upon condition, and wrongfully negotiated by the person to whom it was so delivered.²⁰ And where a check was delivered to the payee by the clerk of the drawer without authority, and afterwards negotiated to a holder in due course, it was held that the purchaser could recover on the check. Being a holder in due course, a valid delivery of the check to the payee was conclusively presumed.²¹

§27. Incomplete Instrument Filled Out and Negotiated Without Delivery.—The presumption as to the delivery of a check, referred to in the preceding sections, contemplates an instrument complete in every particular at the time it leaves the drawer's hands. If the check is merely signed in blank, or is only partially filled out, a different rule applies. If such a check is filled out and negotiated without authority, it cannot be enforced against anyone whose signature was placed thereon before the wrongful taking of the check, even by a holder in due course. This rule is embraced in the provisions of the Negotiable Instruments Law.²² Thus, where a check, which had been signed by the drawer, but not filled out, was stolen and the blank spaces filled, and was then negotiated to a holder in due course, by whom it was collected, it was held that the drawer of the check could recover the amount from the purchaser. The check, having been an incomplete, undelivered instrument, was void under this section of the statute.²³

§28. Presumption Against Delivery.—The fact that a check is in the possession of the drawer raises a presumption that it

19. *Clarke v. Johnson*, 54 Ill. 296; *Shipley v. Carroll*, 45 Ill. 285.

20. *Johnson v. Harrison, Ind.*, 97 N. E. Rep. 930.

21. *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. Rep. 923.

22. §34 of the New York Act. The provision reads as follows: "When an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person, whose signature was placed thereon before delivery."

23. *Linick v. Nutting & Co.*, 140 N. Y. App. Div. 265, 125 N. Y. Supp. 93.

has not been delivered to the payee, and, unless notice of a different state of facts is brought home to the drawee bank, it has a right to act upon that presumption. This applies to a certified check, as well as to one which is not certified, with the result that, where the drawer of a check has it certified, and later appears at the drawee bank with the check in his possession, and requests that the certification be cancelled, and the amount reccredited to his account, the bank is within its rights in acceding to his request.²⁴

24. *Buehler v. Galt*, 35 Ill. App. 225.

CHAPTER IV.

CONSIDERATION.

- §29. Necessity for Consideration.
- §30. Presumption of Consideration.
- §31. What Constitutes Consideration.
- §32. Releasing Debt of Third Party.
- §33. Checks Given in Gambling Transactions.
- §34. Checks Given under Duress.
- §35. Accommodation Checks.
- §36. Gift of Check.

§29. Necessity for Consideration.—A check, to be a binding obligation upon the drawer, in the hands of the payee, must be supported by a sufficient consideration. A check is in effect an engagement that the amount thereof will be paid by the drawee to the holder upon due presentment and, in the event of dishonor and the necessary proceedings being duly taken, that the drawer will pay the amount. When supported by a valid consideration the engagement ripens into a contract. But, when the check is delivered to the payee without consideration, it is in his hands a mere naked promise unenforceable at law.¹ When, however, a check, though given originally without consideration, comes to the possession of a holder in due course, without notice of the want of consideration, he may enforce it in the same manner as though it had been based upon a good and sufficient consideration.² In other words want of consideration is not a defense against the holder in due course of a check.³

1. Purcell v. Armour Packing Co., Ga., 61 S. E. Rep. 138.

2. Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 37 L. Ed. 1063.

3. The Negotiable Instruments Law, §54 of the New York Act, provides as follows: "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise."

See, *infra*, Holders in Due Course, §57.

§30. Presumption of Consideration.—While a check, at least as between the immediate parties, must be supported by a consideration, in order to be enforceable, there is this distinction between checks and other simple contracts, with reference to the proving of consideration. In the usual case of an action brought upon a contract the burden is upon the plaintiff to prove consideration. But when the action is based upon a check, or upon any negotiable instrument, a consideration is presumed. In an action against the drawer of a check the holder makes out a *prima facie* case when he proves the execution and delivery of the check, and that he has taken the necessary steps, such as making due presentment and giving notice of dishonor, to charge the drawer with liability. The check imports its own consideration.⁴

As between the payee and drawer of a check this presumption is not absolute. When the action is brought by the payee against the drawer the presumption may be rebutted by a showing that the check was delivered without consideration. But the *prima facie* presumption of consideration, which a negotiable instrument carries while in the hands of the payee, is transformed into a conclusive and absolute presumption, when the instrument is in the hands of a bona fide holder, who has purchased it for value, before maturity, without notice of any defect in its past history.⁵

It was at one time questioned whether a check came within the category of negotiable instruments so as to import a consideration and carry to the innocent purchaser the same peculiar right of enforcement free from equities which belong to negotiable instruments solely. But this question has long since been settled in favor of the negotiability of checks.

4. *Foster v. Paulk*, 41 Me. 425; *Columbia Inc. Lamp Co. v. Mfg. Co.*, 64 Mo. App. 115; *Terry v. Ragsdale*, 33 Grat. (Va.) 342.

A metal check, issued to a workman in lieu of wages, and transferred by him to another stamped on one side with the name of the company issuing it and on the other "Good for one dollar in merchandise," is presumed to have been based upon an adequate consideration. *Kentucky Coal Mining Co. v. Mattingly*, Ky., 118 S. W. Rep. 350.

The Negotiable Instruments Law, §50 of the New York Act, provides: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

5. *Purcell v. Armour Packing Co.*, Ga., 61 S. E. Rep. 138.

§31. What Constitutes Consideration.—A valuable consideration has been defined as "either some benefit conferred upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made."⁶ When the consideration consists in something other than money, any advantage or benefit to the promisor, no matter how small, or the least injury or detriment to the promisee is sufficient to give vitality to the contract.⁷ In general any consideration, sufficient to support an ordinary contract, will be sufficient to support a check.⁸ The rule is that, where the parties agree upon a consideration, and it is a thing without fixed value, the court will not substitute its judgment as to the adequacy of the consideration for that of the contracting parties, but will uphold and enforce the contract, unless, indeed, there is evidence of fraud.⁹

The consideration may consist of an agreement to perform some act in the future, such as an agreement to transfer or deliver certain property to the drawer of the check at a time subsequent to the giving of the check.¹⁰ And, in such a case,

6. Bouvier's Law Dictionary.

7. *Columbia Inc. Lamp Co. v. Mfg. Co.*, 64 Mo. App. 115.

8. A check delivered in payment for shares of corporate stock, issued to the drawer, is based on a sufficient consideration. *Avon Springs Sanitarium Co. v. Kellog*, 125 N. Y. App. Div. 51, 109 N. Y. Supp. 153.

The Negotiable Instruments Law, §51 of the New York Act, defines consideration as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

9. *Wolford v. Powers*, 85 Ind. 294; *Price v. Jones*, 105 Ind. 543; *Miller v. Finley*, 26 Mich. 249.

10. *Tradesmen's Nat. Bank v. Curtis*, 167 N. Y. 194; *Caren v. Leibovitz*, 99 N. Y. Supp. 952, 113 N. Y. App. Div. 674.

A check delivered in payment for services already rendered and to be rendered by the payee to the drawer is based upon a sufficient consideration and is enforceable. *Foxworthy v. Adams*, Ky., 124 S. W. Rep. 381.

Defendant on March 11, 1909, signed an order for an automobile to be delivered by plaintiff on April 25th. He signed a check for \$500. Plaintiff agreed to hold the check until the defendant could send him a duplicate out of his check book and properly numbered. On March 13th defendant cancelled his order. On the 15th day the check was presented to the bank and payment refused. It was held that the check was founded on a sufficient consideration and that the drawer was liable. *American Automobile Co. v. Perkins*, 83 Conn. 520, 77 Atl. Rep. 954.

the drawer cannot defend on the ground that the property was not delivered, where it is shown that it was tendered and refused.¹¹ Where two persons exchange their checks, each check is consideration for the other.¹² If the drawer of a check delivers it to the payee in exchange for the check of a third person, the drawer is liable thereon even though the check of the third person is dishonored upon presentment.¹³ A pre-existing indebtedness, even though it be barred by the statute of limitations, is a sufficient consideration for the delivery of a negotiable instrument.¹⁴

§32. Releasing Debt of Third Party.—It is held that the surrender of a claim against a third party is good as a consideration. That is, if A is indebted to B and B, in consideration of a check drawn and delivered to him by C, releases the debt, the check is founded upon a valid consideration and may be enforced against the drawer. Thus, where the drawer of a check delivered it to a bank, in order to discharge a claim, which the bank was attempting to enforce against a third person, it was held that the drawer was liable on the theory that the discharge of the original debtor and the substitution of a new one in his stead was a sufficient consideration for the check.¹⁵ But, where the drawer delivered his check to the payee, whereupon the latter delivered certain goods to a third party, it being understood that the check would be paid out of the proceeds of the sale of the goods, received by the third party and turned over to the drawer, which arrangement, however, was not carried

11. *Hawkins v. Windhorst*, 82 Kans. 522, 108 Pac. Rep. 805.

12. *Foster v. Paulk*, 41 Me. 425.

13. *Shannon v. Horley*, 32 Misc. Rep. (N. Y.) 623.

14. *Ingersoll v. Martin*, 58 Md. 67.

15. *National Bank of Newbury v. Sayer*, 73 N. H. 595, 64 Atl. Rep. 189. See also *Carr v. Rountree, Ga.*, 71 S. E. Rep. 589.

Where the defendant gave his check to the plaintiff in payment of a bill owing to the plaintiff from a third party, and the plaintiff thereupon gave the third party a receipt in full, it was held that there was a sufficient consideration for the check and that the plaintiff could recover on it. The court said: "Recurring to the most elementary principles of law, it will be found, we think, that the check had a valuable consideration. It is not enough for the maker to say that he received no benefit. A detriment to the payee is as often a consideration for a promise as a benefit to the man who makes it." *Harris-Emery Co. v. Howerton, Ia.*, 134 N. W. Rep. 1068.

out by the third party, there was no consideration for the check and it was held that the payee could not recover on it.¹⁶

§33. Checks Given in Gambling Transactions.—A check based upon an illegal consideration is unenforceable as between the immediate parties. This applies in many instances to checks arising out of gambling transactions. It is a general rule of law that, where the parties to an agreement have engaged in an undertaking which the courts cannot decently afford to touch, the law will leave them where it finds them. In other words the law will not lend its aid to secure for either party to an illegal or immoral undertaking an advantage to which, except for the illegality or immorality of the transaction, he might be entitled. So, it has been held that the payee of a check, representing his share of the profits in a speculation in cotton futures, cannot enforce it against the drawer.¹⁷

If the loser in a game of chance pays his losses in cash the courts will not, in the absence of a right conferred upon him by statute, aid him in recovering the money thus paid. On the other hand, if he delivers his check, or other negotiable obligation in payment of his losses the courts will not enforce the instrument against him, at least while it is in the hands of the original payee.¹⁸ And where a person, cashes a check drawn to his order, knowing that the drawer wishes the money for gambling purposes, he will not be allowed to recover on the check.¹⁹

Under a Washington statute, which rendered void, except in the hands of holders in due course, all instruments or securities, "the consideration for which shall be money, or other things of value won by playing at any unlawful game," it was

16. *Purcell v. Armour Packing Co.*, Ga., 61 S. E. Rep. 138.

17. *Glass v. Childs*, 9 Ga. App. 520, 71 S. E. Rep. 920. "Where an act which from beginning to end is contrary to public policy is incomplete, and something remains to be done to complete it according to the original undertaking of the parties thereto, the courts cannot afford to assist in the completion of the illegal act."

18. As to the right of a holder in due course to recover in such cases, see *Holders in Due Course*, §57.

19. *Camas Prairie State Bank v. Newman*, 15 Idaho 719, 99 Pac. Rep. 833. "The courts will not lend their aid or assistance in violation of the laws of the state, or to aid or abet in the commission of crime."

See also *Cutler v. Welsh*, 43 N. H. 497.

held that the provision invalidated not only a check given by A to B in payment of sums already lost by A to B in gambling, but also a check given by A to B before the beginning of their game, so that A might have funds wherewith to gamble.²⁰ But where the payee of a check cashes it for the drawer, not knowing that it is the drawer's intention to gamble with the proceeds, the payee is not precluded from recovering.²¹

After a person has lost money at the gaming table, if he gives his check to a person who was not a party to the game, for the purpose of raising money with which to settle his losses, the instrument may be enforced against him by the payee.²² This is so even though the payee of the check is aware at the time it is delivered to him that the drawer's object in raising the cash is to pay gambling losses, already incurred.²³

§34. Checks given under Duress.—Duress is that degree of constraint or danger, either threatened or actually existing, which is sufficient to overcome the mind of a person of ordinary firmness. A check or other instrument given under duress is not enforceable as between the immediate parties.²⁴ A check given under duress is not a void contract; it is voidable only, and may be subsequently ratified by the drawer.²⁵

20. *Ash v. Clark*, 32 Wash. 390, 73 Pac. Rep. 351.

21. *Camas Prairie State Bank v. Newman*, 15 Idaho 719, 99 Pac. Rep. 833.

22. *Wyman v. Fiske*, 3 Allen (Mass.) 238.

23. *Hurlburt & Sons v. Straub*, 54 W. Va. 303, 46 S. E. Rep. 163.

24. *Overstreet v. Dunlap*, 56 Ill. App. 486; *Bush v. Brown*, 49 Ind. 573; *Green v. Scranage*, 19 Ia. 461; *Hullhorst v. Scharner*, 15 Neb. 57; *Schultz v. Catlin*, 78 Wis. 611.

As to the right of a holder in due course to recover on a check given under duress, see, *infra*, *Holders in Due Course*, §57.

25. *Brown v. Worthington*, 152 Mo. App. 351, 133S. W. Rep. 93. In this case defendant gave the plaintiff an option on certain property at a designated price, but raised the price when the plaintiff called for delivery. To get possession, the plaintiff gave the defendant a check which he subsequently paid. It was held, that the payment was a ratification and the plaintiff could not recover back the amount of the check. In the opinion it was said: "While a party may recover back money paid under such circumstances as constitute duress, yet it is also true that a contract secured by duress is not void, but is voidable only, and may be rendered valid by subsequent ratification; and this being true, a party may, after passing from under the influence which may have amounted to duress

§35. Accommodation Checks.—The rules which regulate the liability of parties to accommodation paper have little application to bank checks, for the apparent reason that checks are rarely signed for accommodation. An accommodation instrument is one to which one of the parties puts his name without consideration for the purpose of loaning his credit to some other person, who is to provide for its payment at maturity. A check, being payable immediately upon demand, is not ordinarily resorted to as a means of loaning credit in this manner. A person might, of course, draw his check and deliver it to the payee merely by way of accommodation, with the understanding that the payee would provide the money for the payment of the check prior to its presentment for payment. In such a case the drawer would be liable on the check in the same manner as though it had been delivered upon a sufficient consideration with the exception that it could not be enforced against him by the accommodated party, the payee. The drawer, in such a case, would be liable to a holder for value, even though such holder had knowledge of the circumstances under which the check was given.²⁶

§36. Gift of Check.—A gift is defined as a voluntary and gratuitous transfer of property. It is said that a gift is a contract, but it differs from the ordinary contract in that it is made without consideration moving from the transferee. The gift, to be valid, must be completely performed. If anything remains to be done to complete the gift, that part which remains undone cannot be enforced. If the gift is not completed during the lifetime of the donor his death revokes that part which has been

ratify the same, and if he does ratify it by recognizing it as a valid contract, he may, by his conduct, preclude himself from afterward avoiding it."

Where a debtor was threatened by his creditor with arrest if he did not settle a certain claim, and a third person who was present gave his check for the amount to the debtor, which the debtor indorsed to the creditor, it was held, that even if this constituted duress of the debtor, the drawer could not plead it in an action against him on the check. *Carr v. Rountree*, Ga., 71 S. E. Rep. 589.

26. Negotiable Instruments Law, §55 of the New York Act, reads as follows: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party."

performed. Delivery of the subject of the gift is one of the essential steps in the completion of a valid gift. The owner must part with his dominion and control before the gift can take effect. But, when the owner has parted with his control and delivered the subject matter to the donee with intent to give, the gift is completed and cannot be repudiated by the donor.

In a number of cases the payee of a check has attempted to enforce it against the drawer, though it was given without consideration, upon the theory that it was delivered as a gift. If a man promises to give a certain amount of money to another at a future date, this is a mere promise which, being unsupported by a consideration, cannot be enforced in law. If, however, the cash is actually delivered there is a completed gift and it is irrevocable. If, instead of delivering cash by way of gift, the donor delivers his check on his banker and the payee takes it to the bank and has it paid or certified, here, again, the gift is completely executed and irrevocable. But where the payee holds, by way of gift, the drawer's check which, refused payment by the bank, he seeks to enforce against the drawer if alive, or his estate, if dead, he holds nothing more than the drawer's mere order and promise to pay, which being without consideration, confers upon him no enforceable rights.²⁷

The point was directly decided in England in 1865 that the delivery of a check by the drawer to the payee is nothing more than a promise to give which could not be enforced by the payee. In that case, a father on returning from a journey placed a check for £900 in the hands of his infant son, and said to its mother and nurse "I give this to baby; it is for himself and I am going to put it away for him." He then locked the check up in his safe and died suddenly a few days afterwards. It was held that there was neither a perfect gift to, nor a valid declaration of trust in favor of, the infant.²⁸

27. Pullen v. Placer County Bank, 138 Cal. 169; Thresher v. Dyer, 69 Conn. 404; Martin v. Martin, 89 Ill. App. 147; Foxworthy v. Adams, Ky., 124 S. W. Rep. 381; Second National Bank v. Williams, 13 Mich. 282; Cloyes v. Cloyes, 36 Hun (N. Y.) 145.

See also *infra*, §172.

28. Jones v. Lock 14 W. R. (Eng.) 149.

If a bank pays a check, delivered to the payee as a mere gift, after the death of the drawer, with knowledge of that fact, it is liable for the amount of the check to the drawer's estate. Pullen v. Placer County Bank, 138 Cal. 169.

In a New York case, the payee sought to recover from the drawer the amount of a check which he had drawn in her favor as a gift. But the court said: "the action cannot be maintained on the theory that the check was a valid gift. * * * It was a naked promise. There is a broad distinction between the gift of the check or obligation of a third person and a gift of the donor's promise to pay."²⁹

In an Ohio case, the court said: "Until the check was either paid or accepted, the gift was incomplete; and in the absence of such payment or acceptance the death of the drawer operated as a revocation of the check. * * * The check in the present instance was a mere order or authority to the payee to draw the money; and being without consideration, it was subject to be countermanded or revoked while it remained unacted or in the hands of the payee."³⁰

Even in those states, which have held that a check operates as an assignment to the payee, it is held that a check, delivered to the payee as a mere gift, and not paid or certified by the drawee, cannot be enforced by the payee.³¹

29. *Cloyes v. Cloyes*, 36 Hun (N. Y.) 145.

30. *Simmons v. Society*, 31 Ohio St. 457.

31. *Martin v. Martin*, 89 Ill. App. 147.

CHAPTER V.

TRANSFER.

- §37. What Constitutes Negotiation.
- §38. Place and Form of Indorsement.
- §39. When Person Deemed Indorser.
- §40. Special Indorsements and Indorsements in Blank.
- §41. Blank Indorsement Changed to Special Indorsement.
- §42. Transfer of Bearer Instrument Specially Indorsed.
- §43. Liability of Indorser where Paper Negotiable by Delivery.
- §44. Warranties of General Indorsers.
- §45. Qualified Indorsements.
- §46. Warranties of Qualified Indorser and Transferrer by Delivery.
- §47. Restrictive Indorsements.
- §48. Effect of Restrictive Indorsements.
- §49. Effect of Restrictive Indorsement on Instrument Payable to Bearer.
- §50. Warranties of Restrictive Indorsers.
- §51. Conditional Indorsements.
- §52. Instruments Payable to Two or More Persons.
- §53. Instruments Payable to Officer of Bank.
- §54. Effect of Transfer Without Indorsement.
- §55. Where Instrument Negotiated Back to Prior Party.
- §56. Order in which Indorsers are Liable.

§37. What Constitutes Negotiation.—Negotiation is one of the three methods of transfer, the other methods of transfer being by assignment and by operation of law, as where, upon the death of the holder of a negotiable instrument, title vests in his personal representative, or where, upon his bankruptcy, title vests in his trustee.¹ An instrument is said to be negoti-

1. Upon the death of a person leaving negotiable paper payable to himself, his administrator or executor takes title by operation of law. *Wooley v. Lyon*, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; *Crist v.*

ated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by indorsement of the holder completed by delivery.²

It sometimes becomes important to determine whether or not an instrument has been negotiated within the meaning of the Negotiable Instruments Law. For instance, it is provided in the statute that every person "negotiating" an instrument by delivery or qualified indorsement, warrants the genuineness of the instrument and his own title to it. It is held that, where a check is presented for payment by the holder to the bank on which it is drawn, there is no negotiation and that, consequently the bank can not recover the money paid to the holder, though the drawer's signature is forged, the holder being innocent of knowledge of the forgery.³

§38. Place and Form of Indorsement.—Where an instrument is payable to order and an indorsement is necessary to transfer title, the indorsement must be in writing and the proper place

Crist, 1 Ind. 570; Rand v. Hubbard, 4 Metc. (Mass.) 252; Campbell v. Brown, 64 Ia. 425, 20 N. W. Rep. 745.

Upon the bankruptcy of a person title to negotiable paper owned by him vests in his trustee by operation of law. Roberts v. Hall, 37 Conn. 205.

2. Odell v. Clyde, 57 N. Y. S. 126, 38 N. Y. App. Div. 333; Whitworth v. Adams, 5 Rand. (Va.) 333, 415; Shaw v. Merchants' Nat. Bank, 101 U. S. 557, 562, 25 L. Ed. 892.

Negotiable Instruments Law, Section 60 of the New York Act. This section, it should be noted, is qualified by section 79, which provides that delivery, without indorsement, vests title in the transferee, and carries with it the right to compel the indorsement of the transferor. Swenson v. Stoltz, 36 Wash. 318, 78 Pac. Rep. 999. See, *infra*, §54.

3. National Bank of Commerce v. Farmers' & Merchants' Bank, Neb., 128 N. W. Rep. 522. "If A gives B a check on C Bank," said the court, "and B presents the check at the counter of C., no negotiation is necessary or had. He simply demands and receives payment; but if B goes to D's store and buys a bill of goods, and tenders the indorsed check in payment, he negotiates the check. The presentation by the defendant of the check in controversy for payment was not a 'negotiation' of the check within the meaning of the statute."

As to the right of a drawee bank to recover money paid on checks bearing forged signatures and indorsements, see *infra*, Chap. XI.

§39. When Person Deemed Indorser.—Prior to the adoption of the Negotiable Instruments Law, there was a general conflict among the courts of the different States as to the liability of one who indorsed a negotiable instrument before delivery. In some states he was presumed to be a joint maker. In others his liability was regarded as that of a guarantor. In other jurisdictions he was presumed to be an indorser. The nature of his liability usually came into issue when the holder had failed to present the instrument for payment and to give the indorser due notice of dishonor. If the party's liability were that of indorser he could not be held unless the requirements as to presentment and notice had been complied with. If regarded as a joint maker, or as a guarantor these formalities of presentment and notice would not be necessary. This conflict is settled by the Negotiable Instruments Law, which provides that a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.¹⁶

§40. Special Indorsements and Indorsements in Blank.—A special indorsement, or an indorsement in full, as it is sometimes called, specifies the person to whom, or to whose order, the instrument is to be payable, as, for instance, an indorsement reading "Pay to B or order" and signed A. Where an instrument is so indorsed, the indorsement of B is necessary to further negotiation.¹⁷ An indorsement in blank is defined in the Negotiable Instruments Law as one which specifies no indorsee, and it is there declared that an instrument so indorsed is payable to bearer, and may be negotiated by delivery. In form a blank indorsement consists in writing merely the name of the payee, or of the holder, on the back of the instrument.¹⁸

16. Neg. Inst. Law, §113 of the New York Act.

17. Neg. Inst. Law, §64 of the New York Act.

As to the effect of a special indorsement on an instrument payable to bearer, see, *infra*, §42.

18. Neg. Inst. Law, §64 of the N. Y. Act.

Where the payee of a check indorsed it, "Pay to the order of," leaving a sufficient blank between these words and his signature to write the name of the holder. It was held that the indorsement made the check payable to bearer and negotiable by delivery. *State v. Hinton*, Oregon, 109 Pac. Rep. 24.

possibility of indorsing on a paper separate from the instrument intended to be transferred. It provides that "the indorsement must be written on the instrument itself or upon a paper attached thereto."⁹

The signature of the indorser without additional words is a sufficient indorsement. If the name of the payee or indorsee is misspelled, or wrongly designated, the holder may negotiate by writing the name as in the instrument, adding, if he thinks fit, his proper signature.¹⁰ While a rubber stamp indorsement is valid and sufficient to transfer title to the instrument indorsed, when made by one having authority, such an indorsement, like other indorsements, does not prove itself and one bringing an action on an instrument so indorsed must prove that it was indorsed to him for value before maturity and without notice, where the indorsement is denied.¹¹ In order to transfer title to an instrument by indorsement, a delivery by the indorser to the indorsee or its equivalent is necessary.¹² Where an indorsement is undated, it is presumed to have been made on the date of the execution and delivery of the instrument.¹³ The rule that there is a presumption of consideration for a negotiable instrument applies to a transfer of the instrument, and a consideration for an indorsement is presumed;¹⁴ and in the absence of contrary proof every indorsement on an instrument is presumed to have been made at the place where the instrument is dated.¹⁵

9. Neg. Inst. Law, §61 of the N. Y. Act.

10. *Solomon v. Hopkins*, 61 Conn. 47; *Earhart v. Gant*, 32 Ia. 481; *Bolles v. Stearns*, 11 Cush. (Mass.) 320; *Negotiable Instruments Law*, Sections 61 and 73 of the New York Act.

The indorsement of an instrument, payable to the Northland Motor Car Company, is valid though the word "Car" is omitted. *First Nat. Bank v. McNairy*, 122 Minn. 215, 142 N. W. 139.

11. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. Rep. 447.

12. *Spencer v. Carstarphen*, 15 Colo. 445, 24 Pac. Rep. 882; *Daniel v. Royce*, 96 Ga. 566, 23 S. E. Rep. 493; *Pardee v. Lindley*, 31 Ill. 174; *Badgley v. Votrain*, 68 Ill. 25; *Middleton v. Griffith*, 57 N. J. Law 442, 31 Atl. Rep. 405.

13. *Rodriguez v. Merriman*, 133 Ill. App. 372; *Grier v. Cable*, 45 Ill. App. 405; *Way v. Butterworth*, 108 Mass. 509; *Bradford v. Prescott*, 85 Me. 482; *Mason v. Noonan*, 7 Wis. 510.

14. *Gwyn v. Lee*, 1 Md. Ch. 445; *Connerly v. Planters' & Merchants' Ins. Co.*, 66 Ala. 432; *Pratt v. Adams*, 7 Paige, (N. Y.) 615; *Owens v. Snell*, 29 Or. 483, 44 Pac. 827.

15. *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299.

for it is upon the back of the instrument.⁴ It is not, however, essential that the indorsement be placed on the back. The indorsement may be written on face of the instrument, and with good effect. Thus, in an action on a promissory note it has been held sufficient evidence of title in the plaintiff, as indorsee, that the names of the payees were written on the face of the note, at the left hand end.⁵

It is not necessary that an indorsement should be on the identical paper upon which an instrument is written. It has long been held that an indorsement may be made on a paper, attached to the instrument, known as an allonge.⁶ The usual reason for making use of an allonge is that there is no longer room on the instrument for an indorsement. But it need not appear that there is an actual physical impossibility of writing an indorsement on the original paper, in order that an allonge may be used. On the contrary, the usage of the mercantile law is, as Chief Justice Marshall has said, "founded in convenience." Whenever it is inconvenient to write upon the back of an instrument the contract between the parties, it may be written upon another paper and attached to it with like effect.⁷ Where a torn instrument has been pasted upon another piece of paper it has been held that an indorsement may be made upon such paper.⁸ The Negotiable Instruments Law precludes the

4. *French v. Turner*, 15 Ind. 59; *Williams v. Osbon*, 75 Ind. 28; *Franklin v. Twogood*, 18 Iowa 515; *Richards v. Warring*, 39 Barb. (N.Y.) 42; *Freund v. Importers Nat. Bank*, 76 N. Y. 352; *Partridge v. Davis*, 20 Vt. 499; *Gorman v. Ketchum*, 33 Wis. 427.

A check payable "to the order of bearer, B. Cohen" is payable to order and not to bearer and cannot be negotiated without the payee's indorsement. *Bloomington v. National Butchers' & Drovers' Bank*, 35 Misc. Rep. (N. Y.) 594, 68 N. Y. Supp. 35.

An indorsement, "for deposit in the National Bank of Florida to the credit of E. J. Neher," is a proper and effective indorsement, although the name of the indorser forms part of a sentence. *Haskell v. Avery*, 181 Mass. 106, 63 N. E. Rep. 15.

5. *Shain v. Sullivan*, 106 Cal. 208.

Where persons wrote their names on the face of an accepted bill, under the name of the acceptor, the intention to assume liability as indorsers being clear, the signatures were held valid as indorsements, the place of the writing being immaterial. *Young v. Glover*, 3 Jur. N. S. (Eng.) 637.

6. *Fountain v. Bookstaver*, 141 Ill. 461, 31 N. E. Rep. 17.

7. *Crosby v. Roub*, 16 Wis. 616.

8. *Crutchfield v. Easton*, 13 Ala. 337.

§41. Blank Indorsement Changed to Special Indorsement.—

The holder of an instrument indorsed in blank may convert the indorsement into a special indorsement by writing over the signature of the indorser, any contract consistent with the character of the indorsement.¹⁹

§42. Transfer of Bearer Instrument Specially Indorsed.—

A blank indorsement makes the instrument so indorsed transferable by delivery, without the holder's indorsement, in the same manner as an instrument payable to bearer. When an instrument is payable to bearer, or after it is once indorsed in blank, a subsequent indorsement to a particular person, or order, does not limit its transferability. An instrument, being once made payable to bearer may, notwithstanding a subsequent special indorsement, still be transferred by delivery without the indorsement of the holder. This rule, is embodied in the Negotiable Instruments Law. The provision is in these words: "Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery." And this further provision is added: "but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."²⁰

§43. Liability of Indorser where Paper Negotiable by Delivery.—

It sometimes happens that a person unnecessarily indorses a negotiable instrument. To illustrate, the payee of a check indorses it in blank and delivers it to A. The check may now be transferred by delivery without indorsement, for it is payable to bearer. If A, transfers it without indorsing it he is liable in accordance with the rules regulating the liability of transferrers by delivery. But if A, indorses the check he then incurs the liabilities of a general indorser, notwithstanding that his indorsement was unnecessary to transfer title to the check. His liability, in such case, is the same as though the

19. Neg. Inst. Law, §65 of the New York Act.

Lucas v. Byrne, 35 Md. 485; Farwell v. Meyer, 36 Ill. 510; Adrain v. McCaskill, 103 N. C. 182, 9 S. E. Rep. 284.

20. Neg. Inst. Law, §70 of the N. Y. Act.

Where a note is payable to a fictitious payee, it is payable to bearer and an indorsement is not necessary. Kohn v. Watkins, 26 Kan. 691; Lane v. Krekle, 22 Iowa 399.

check had been indorsed to his order and his indorsement was essential to a transfer of the instrument.²¹

§44. Warranties of General Indorsers.—Every general indorser of a check, that is, every indorser who indorses without qualification, in addition to his engagement to pay the check in the event of its dishonor, provided the necessary steps to charge him as indorser are taken, enters into certain warranties which the law implies as part of his contract of indorsement and transfer.²²

In the first place he warrants the genuineness of the instrument which he indorses.²³ Thus, where a person indorses a check generally and transfers it, and it later develops that a

21. As expressed in section 117 of the Negotiable Instruments Law (N. Y. Act): "Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser."

22. The Negotiable Instruments Law, Section 116 of the New York Act, made complete by the inclusion of certain provisions, which the section embraces by reference, reads as follows:

"Every indorser who indorses without qualification warrants to all subsequent holders in due course:

"That the instrument is genuine and in all respects what it purports to be;

"That he has good title to it;

"That all prior parties had capacity to contract;

"That the instrument is at the time of his indorsement valid and subsisting;

"And, in addition, he engages that on due presentation, it shall be accepted, or paid, or both, as the case may be, according to its tenor and that if it be dishonored and the necessary proceedings upon dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

23. *First Nat. Bank v. Farmers' & Merchants' Bank*, 56 Neb. 149; *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun. (N. Y.) 475; *White v. Continental Nat. Bank*, 64 N. Y. 316; *Egner v. Corn Exchange Bank*, 42 Misc. Rep. (N. Y.) 552, 86 N. Y. Supp. 107; *Whitney v. National Bank of Potsdam*, 45 N. Y. 303; *First Nat. Bank v. First Nat. Bank*, 68 O. St. 43, 67 N. E. Rep. 91.

An accommodation indorsement imports a guaranty of genuineness. *Packard v. Windholz*, 88 N. Y. App. Div. 365.

The accommodation indorser of a check warrants the genuineness of the check to the drawee bank. When it appears that a check so indorsed was raised before indorsement, the indorser is liable to the drawee bank for the amount by which the check was raised. *Smith v. State Bank*, 104 N. Y. Supp. 750, 54 Misc. Rep. (N. Y.) 550.

prior indorsement on the check was a forgery, he is liable to the transferee upon his warranty of genuineness.²⁴ The general indorser also warrants that he has good title to the instrument. In warranting his title the indorser agrees that, if the instrument cannot be enforced against the original parties because it was lost by them, or stolen from them, these defenses will not be available to the indorser.

And the general indorser warrants that all prior parties had capacity to contract. In effect he says: "All prior parties, whose names appear upon this instrument are competent to contract; none of them can successfully set up incapacity to contract as a defense." If it turns out that the instrument cannot be enforced against the original parties because they were infants, or married women, or insane persons, or because an original party was an agent, partnership, or corporation, acting without authority, then the indorser is liable upon his warranty.²⁵

There is also in the general indorser's contract an implied warranty that the instrument, at the time of the indorsement, was valid and subsisting. In warranting the validity of the instrument the indorser agrees that, if the paper cannot be enforced against an original party because of some illegality in its inception, for example, because it was given for a gaming debt, or void for usury, or given for other illegal consideration, these defenses will not be available to him.²⁶ Thus, where a promissory note was made on Sunday, the fact that it could not be enforced against the maker was immaterial in an action against the indorser brought by the holder. This was no defense to the indorser for, by his indorsement, he warranted the existence and legality of the instrument.²⁷

When it appears that one of the foregoing warranties has been broken, for instance, where it appears that the drawer of a check is an infant, or that the payee's indorsement is a forgery, the general indorser is liable to the holder although the instru-

24. *Egner v. Corn Exchange Bank*, 42 Misc. Rep. (N. Y.) 552, 86 N. Y. Supp. 107.

25. *Willard v. Crook*, 21 App. D. C. 237; *Leonard v. Draper*, 187 Mass. 536, 73 N. E. Rep. 644.

26. *Horowitz v. Wollowitz*, 59 Misc. Rep. (N. Y.) 520, 110 N. Y. Supp. 972.

27. *Prescott Nat. Bank v. Butler*, 157 Mass. 548.

ment is not presented for payment and no notice is given to the indorser. The failure to present for payment and to take the other steps necessary to charge an indorser, releases the indorser from liability, but only from liability as indorser, that is, his obligation to pay the instrument in case of its dishonor. To hold him to this obligation he must be given due notice of dishonor. But his liability on the warranties which are implied in the contract of transfer is something separate and apart from his liability as indorser. And notice of dishonor is not necessary to fix this liability as to warranties.

There is good reason for this distinction. Suppose a check is drawn by A, payable to B, and indorsed by B to C. Now, say C presents the check to the drawee bank for payment and payment is refused. If C gives notice to B, the latter is thereby enabled to take up the check immediately and proceed against A, the drawer. But if C does not give notice to B until some time later, B may in the meantime lose the opportunity of protecting himself by proceeding against A. So, in every such case, the law declares that B shall be discharged of liability, unless notice of dishonor is duly given to him. Now, alter the case by the addition of a new element and suppose that A, the drawer, is an infant and so not liable on the instrument. B, by his indorsement, warranted that A was competent to draw a binding check. He is liable on this warranty without notice of dishonor just as he would be on a warranty as to the quality of goods which he might sell. Giving him notice would not improve his situation in any respect, for he could no more compel the infant to pay the check than could his indorsee.²⁸

The warranties of indorsers can be enforced against them, only by a holder in due course.²⁹ It has been held in this regard that the indorser of a check does not warrant to the drawee bank the genuineness of the signature of the drawer. The drawee, in such case, is not regarded as a holder in due course.³⁰

28. *Turnbull v. Bowyer*, 40 N. Y. 456.

29. *Bruck v. Lambeck*, 118 N. Y. Supp. 494, 63 Misc. Rep. (N. Y.) 117. The Negotiable Instruments Law expressly provides that the indorsers' warranties run to holders in due course only. See section 116 of the New York Act.

30. *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. Rep. 939.

As to the right of a drawee bank to recover money paid on checks bearing forged signatures or indorsements see, *infra*, Chap. XI.

§45. Qualified Indorsements.—A qualified indorsement is one which constitutes the indorser a mere assignor of the title to the instrument. The most usual form of the qualified indorsement is the indorsement without recourse. Such an indorsement, however, may be made by the use of any other words of similar import, for instance, "Sans recourse," or "at the indorsee's own risk."³¹

In effect a qualified indorser says, "I indorse this instrument to you, but I will not be responsible for the financial standing of the other parties thereto." He does not warrant (as the general indorser does), that the instrument will be paid at maturity and that, if it is not paid by the other parties to the instrument, he will see that it is paid. The qualified indorser, however, does not escape liabilities on certain warranties which will be referred to in a subsequent section.³²

The fact that an instrument is indorsed without recourse, or otherwise qualifiedly indorsed, does not throw any discredit upon the instrument, or put a purchaser upon notice as to equities.³³ Nor does it have any effect upon the negotiability of the instrument.³⁴

§46. Warranties of Qualified Indorser and Transferrer by Delivery.—The contract of a qualified indorser, or one who transfers a check by delivery without indorsement, differs somewhat from the engagement of the general indorser. Although there is a popular impression to the contrary the writing of the words "without recourse" or other words of similar import above the signature of an indorser, does not cut off all responsibility in connection with the instrument thus indorsed, nor does a transfer by delivery without indorsement make the transferrer a complete stranger to liability on the instrument. In such cases, the transferrer by qualifying his indorsement, or by refusing to indorse, disclaims all liability for the financial responsibility of the parties who precede him on the

31. *Doom v. Sherwin*, 20 Colo. 234, 38 Pac. Rep. 56; *Watson v. Chesire*, 18 Ia. 202; *Stevenson v. O'Neal*, 71 Ill. 314; *Cross v. Hollister*, 47 Kan. 652, 28 Pac. Rep., 693; *Rice v. Stearns*, 3 Mass. 225; *Corbett v. Fetzer*, 47 Neb. 269, 66 N. W. Rep. 417; *Craft v. Fleming*, 46 Pa. 140.

32. See, *infra*, §46.

33. *Elgin City Banking Co. v. Hall*, 119 Tenn. 548, 108 S. W. Rep. 1068; *Lomax v. Picot*, 2 Rand (Va.) 247.

34. *Borden v. Clark*, 26 Mich. 410.

instrument. But the law implies certain warranties to transfers of this kind, for a breach of which, the qualified indorser, or the party transferring without indorsement, will be held liable. He warrants that the instrument is genuine, that he has a good title to it, and that all prior parties had capacity to contract, just as does the general indorser. There is this distinction, however, between the contract of a general indorser and one who indorses qualifiedly, or transfers without indorsement. The qualified indorser or transferor without indorsement does not warrant that the instrument was valid and subsisting at the time of his indorsement. His warranty in this regard is that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.³⁵

Thus far the qualified indorser and the transferor by delivery stand on the same footing; what one warrants the other warrants. But the Negotiable Instruments Law makes this distinction between these two classes of transfer. Where an instrument is negotiated by delivery without indorsement, the person negotiating it can be held responsible upon a warranty only by his immediate transferee. That is to say, if the holder of a check indorsed in blank transfers it to A, without indorsing it, the warranty operates only in favor of A, no matter into whose hands

35. *Meyer v. Richards*, 163 U. S. 385, 41 Law Ed. 199; *Smith v. Corege*, 53 Ark. 295, 14 S. W. Rep. 93; *Birmingham Nat. Bank v. Bradley*, 103 Ala. 109, 15 So. Rep. 440; *Challiss v. McCrum*, 22 Kan. 157; *Ferguson v. Staples*, 82 Me. 159, 19 Atl. Rep. 158; *Waller v. Stapels*, 107 Iowa 738; *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. Rep. 103; *Thompson v. McCullough*, 31 Mo. 224; *Palmer v. Courtney*, 32 Neb. 773, 49 N. W. Rep. 754; *Littauer v. Goldman*, 72 N.Y. 506; *Dumont v. Williamson*, 18 Ohio St., 516; *Frazer v. D'Innvilliers*, 2 Pa. 200.

The Negotiable Instruments Law, Section 115 of the New York Act provides:

"Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes."

the instrument may subsequently come, but if the holder indorses the check without recourse, and delivers it to A, then his warranty runs to A and to any subsequent holder in due course as well.³⁶

§47. Restrictive Indorsements.—The Negotiable Instruments Law describes three classes of restrictive indorsements. It first mentions those which prohibit a further negotiation of the instrument, as for instance, an indorsement reading "pay to A only."³⁷ An indorsement of this kind, to be effective as a restrictive indorsement, must contain express words of restriction. The mere absence of words implying power to negotiate does not make the indorsement restrictive, and does not deprive the instrument of negotiability. To illustrate, if the payee of a check indorses it "pay to A," omitting the usual words "or order" the indorsement is special, not restrictive. The effect is the same as if the instrument had been indorsed "Pay to A, or order."³⁸

A second class of restrictive indorsements are those by which the indorsee is constituted the agent of the indorser. This is the most common instance of restrictive indorsement. It includes indorsements for collection, in various forms.³⁹

36. Negotiable Instruments Law, Section 115 of the New York Act.

37. Negotiable Instruments Law, Section 66 of the New York Act provides as follows:

When indorsement restrictive.—An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

38. *Leavitt v. Putnam*, 3 N. Y. 494.

An indorsement "pay to Jack Power only" is restrictive, and prohibits further negotiation. *Power v. Finnie*, 4 Call. (Va.) 411.

39. *Bank of the Metropolis v. First Nat. Bank*, 19 Fed. Rep. 301; *Commercial National Bank v. Armstrong*, 39 Fed. Rep. 684; *First Nat. Bank v. Reno County Bank*, 3 Fed. Rep. 257; *White v. Bank*, 102 U. S. 658; *Sweeny v. Easter*, 1 Wall. (U. S.), 166, 173; *White v. Miners' Nat. Bank*, 102 U. S. 658, 26 L. Ed. 250; *Ward v. Smith*, 74 U. S. (7 Wall.) 477, 19 L. Ed. 207; *Commercial Bank v. Armstrong*, 148 U. S. 50, 37 L. Ed. 363; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524;

There is a difference of opinion as to whether the indorsement of a check "for deposit" is a restrictive indorsement and vests title to the check in the bank. Probably the better rule is that such an indorsement creates more than a mere agency for collection, and that when a check is so indorsed and delivered to a bank, the title to the instrument passes to the bank.⁴⁰ There are, however, cases which hold that the indorsement of a check "for deposit" to the credit of the indorser is a restrictive indorsement, and that such an indorsement indicates that the bank, to which the check is indorsed is merely a bailee of the check until it is collected, when the bank becomes the debtor

Central Railroad v. First Nat. Bank, 73 Ga. 383; Claffin v. Wilson, 51 Iowa 15, 50 N. W. 578; Padfield v. Green, 85 Ill. 529; Armour Bros. Banking Co. v. Riley County Bank, 30 Kan. 163, 1 Pac. Rep. 506; Best v. Nokomis Bank, 76 Ill. 608; Locke v. Leonard Silk Co., 73 Mich. 479; Merchants' Nat. Bank v. Hanson, 33 Minn. 40, 21 N. W. 849; Mechanics' Bank v. Valley Packing Co., 70 Mo. 643; Northwestern Nat. Bank v. Bank of Commerce, 107 Mo. 402, 17 S. W. Rep. 982; Leary v. Blanchard, 48 Me. 269; Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 24 N. E. Rep. 779; Third Nat. Bank v. Clark, 23 Minn. 263; Boyer v. Richardson, 52 Neb. 156, 71 N. W. Rep. 981; Bank of Clarke County v. Gilman, 81 Hun. (N. Y.) 486, 30 N. Y. Supp. 1111; National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852; Smith v. Bayer, 46 Or. 143, 79 Pac. 497; Lawrence v. Fussell, 77 Pa. 460; King v. Fleece, 54 Tenn. 273; Continental Nat. Bank v. Weems, 69 Tex. 489; Bowman v. First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; Blakeslee v. Hewitt, 76 Wis. 341, 44 N. W. 1105.

In *Doppelt v. National Bank of the Republic*, 74 Ill. App. 429; *aff'd.*, 175 Ill. 432, 51 N. E. Rep. 753, it was held that an indorsement "for collection to the credit of" was not a restrictive indorsement but had the same effect as an indorsement in blank.

Where an instrument is indorsed for collection by the payee, and the payee afterwards obtains possession of the instrument and indorses it specially to another person for value, the indorsement for collection is cancelled by the subsequent special indorsement. *Brook v. Vannest*, 58 N. J. Law 162, 33 Atl. Rep. 382.

See, *infra*, §214.

40. *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 55 N. E. Rep. 360.

In *Ditch v. Western Bank*, 79 Md. 192, 29 Atl. Rep. 72, it was held, that a check indorsed "for deposit to the credit of" the payee, for which the bank gave cash credit, did not constitute a restrictive indorsement, and that the bank acquired a good title to the check.

See, *infra*, §215.

of the depositor for the proceeds.⁴¹ In considering these indorsements it will be found that, where the depositor is permitted to draw before collection, it is generally held that title passes to the bank.

The indorsement of a check "to the order of any bank or banker" is generally held to be restricted. Such an indorsement carries the right to collect the amount due on the check and bring suit therefor, but it does not transfer the title of the check to the indorsee.⁴² An indorsement "for the account of" the indorser, is held to be a restrictive indorsement.⁴³

The third class of restrictive indorsements are those which vest title to the instrument in trust for, or to the use of, some other person. An example of such an indorsement is one which reads, "Pay A for the account of B," B being some person other than the indorser, or an indorsement by the holder to some person as trustee for a third party.⁴⁴ Such an indorsement does not destroy the negotiability of the instrument, but whoever purchases it, takes it with notice of the rights of the person for whose benefit the instrument is transferred.⁴⁵

§48. Effect of Restrictive Indorsements.—In considering the effect of restrictive indorsements, indorsements of this kind may be divided into two classes, those which make the indorsee the

41. *Beal v. City of Somerville*, 50 Fed. Rep. 647; *Haskell v. Avery*, 181 Mass. 106, 63 N. E. Rep. 15; *Freeman v. Exchange Bank of Macon*, 87 Ga. 45. But see *Fourth Nat. Bank v. Mayer*, 89 Ga. 108, where it was held that the indorsement of a draft "for deposit to the credit of" the drawer, coupled with the fact that the depositor is allowed to check against the deposit, vests title to the draft in the bank, so that the proceeds of draft, in the hands of a correspondent, to which it was forwarded for collection, are not subject to garnishment at the instance of a creditor of the drawer.

42. *First Nat Bank v. Savannah Bank & Trust Co.*, 8 Ga. App. 182, 68 S. E. Rep. 872; *Bank of Ind. Territory v. First Nat. Bank*, 109 Mo. App. 665, 83 S. W. Rep. 537; *National Bank of Rolla v. First Nat. Bank, Mo.*, 125 S. W. Rep. 513; *First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 65 N. E. Rep. 24.

43. *White v. Miners' Nat. Bank*, 102 U. S. 658; *First Nat. Bank v. Reno County Bank*, 3 Fed. Rep. 257; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass. 413, 24 N. E. Rep. 779; *Lawrance v. Fussell*, 77 Pa. 460.

44. *Hook v. Pratt*, 78 N. Y. 371, where a bill was indorsed to the order of the plaintiff "for the benefit of her son Charlie."

45. *Fawsett v. National Life Ins., Co.*, 97 Ill. 11.

agent of the indorser for purposes of collection, and those which make the indorsee a trustee for some third person. The class first mentioned includes indorsements for collection in various forms. An indorsement of this kind carries with it the right to receive payment of the instrument or to bring any action thereon that could be brought by the indorser; it does not, however, pass the title of the instrument to the indorsee, but merely constitutes him the agent of the indorser to collect and remit the proceeds. It is apparent from the form of such an indorsement that the indorser does not intend to transfer title, and an instrument so indorsed is notice to all parties dealing with it, that the ownership thereof is retained by the indorser.⁴⁶

The other class includes indorsements such as "Pay A or order for the benefit of B," B being some one other than the indorser. These indorsements have received a different construction at the hands of the courts. Where an instrument is so indorsed it is held that title passes to the indorsee, unless words are used which are inconsistent with such a construction. The indorsee in such a case cannot, of course, transfer the instrument in payment of a personal obligation, and every transferee takes the instrument subject to the trust created by the indorsement.

46. *Commercial Nat. Bank v. Armstrong*, 39 Fed. 684; *White v. National Bank*, 102 U. S. 658, 26 L. Ed. 250; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524, 17 So. Rep. 728; *Armour Bros. Banking Co. v. Riley County Bank*, 30 Kan. 163, 1 Pac. 506; *Menzies v. Farmers' Bank of Kentucky*, 3 Ky. Law Rep. 822; *Haskell v. Avery*, 181 Mass. 106, 63 N. E. Rep. 15; *Locke v. Leonard Silk Co.*, 37 Mich. 479; *Midland Nat. Bank v. Roll*, 60 Mo. App. 585; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402, 17 S. W. Rep. 982; *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. Rep. 981; *Bank of Clarke County v. Gilman*, 81 Hun. (N. Y.) 486, 30 N. Y. Supp. 1111; *Smith v. Bayer*, 46 Or. 143, 79 Pac. 497; *Blaine v. Bourne*, 11 R. I. 119; *King v. Fleece*, 54 Tenn. (7 Heisk.) 273.

The Negotiable Instruments Law, Section 67 of the New York Act provides as follows: "A restrictive indorsement confers upon the indorsee the right

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement."

See also, *infra*, §214.

In one instance a person drew a bill payable to his own order and indorsed it to the plaintiff "for the benefit of her son Charlie." After the death of the drawer, the plaintiff brought action against his executors on the bill. For a defense they relied on the ground that the indorsement was restrictive and, therefore, negated the presumption of consideration. But it was held that the plaintiff could recover without proving a consideration. The restrictive indorsements which negative the presumption of consideration, are such as indicate that they are not intended to pass the title, but merely to enable the indorsee to collect for the benefit of the indorser, such as indorsements "for collection" or others indicating that the indorser is entitled to the proceeds. These indorsements create merely an agency, and negative the presumption of the transfer of the bill for a valuable consideration. But the indorsement in the case presented afforded no such indication. The indorser parted with title to the bill and the presumption was that he did so for a consideration. The indorsement was restrictive only to the extent that it gave notice of the rights of the beneficiary and protected him against a misappropriation.⁴⁷

§49. Effect of Restrictive Indorsement on Instrument Payable to Bearer.—The question has been raised as to the effect of a restrictive indorsement on an instrument payable to bearer. The Negotiable Instruments Law⁴⁸ provides that where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery. That is, if an instrument payable to bearer is indorsed by the holder "Pay to A or order," A's indorsement is not necessary to the negotiation of the instrument. He may transfer by delivery of the instrument without his indorsement. But the statute says nothing as to the effect of a restrictive indorsement in such a case. Inasmuch as the effect of a special indorsement on an instrument payable to bearer is expressly stated, it would seem that the same effect is not to be given to a restrictive indorsement on such an instrument. Had the statute contemplated the transfer of a bearer instrument, restrictively indorsed, by delivery, it would have expressly so stated. It would follow that a restrictive indorse-

47. *Hook v. Pratt*, 78 N. Y. 371.

48. *Neg. Inst. Law*, §70 of the N. Y. Act.

ment on an instrument payable to bearer, has the same effect that such an indorsement has on an instrument which designates a particular person as payee⁴⁹

§50. Warranties of Restrictive Indorsers.—Inasmuch as the Negotiable Instruments Law specifically provides what warranties shall attach to indorsers without qualification, qualified indorsers, and those who transfer by delivery without indorsement, and since the statute contains no provision with respect to the warranties of restrictive indorsers, the conclusion would seem to be justified that indorsements of this character carry with them no warranties. In those cases, in which the question has arisen as to what is warranted by an indorser for collection, it has been held, that the indorsement of a check for collection does not warrant to the drawee bank the genuineness of the drawer's signature.⁵⁰ In this connection it may be mentioned that there is no form of indorsement which does warrant to the drawee of a check the genuineness of the drawer's signature. The drawee of a check bearing a forged signature may be allowed to recover in certain instances the money paid on the check, but the right to recover is based on grounds other than the indorser's warranty.⁵¹

It has been held that one who indorses a check for collection guarantees the genuineness of the indorsements on the check.⁵² But in Massachusetts, it was held, that the indorsement of a check "Pay to any National Bank or order" did not warrant to the drawee the genuineness of prior indorsements. It was

49. A restrictive indorsement on a check payable to bearer stops its currency. *Johnson v. Mitchell*, 50 Tex. 212.

50. *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St., 207, 50 N. E. Rep. 723; *First Nat. Bank v. Yost*, 11 N. Y. Supp. 862.

51. See §44 and, *infra*, Chap. XI.

52. *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St., 207, 50 N. E. Rep. 723. In these cases the action was brought in each instance by a drawee bank to recover from an indorser for collection the amount paid out on a check bearing a forgery of the indorser's signature. While it was held that the indorsement did not warrant the genuineness of the drawer's signature and that the bank could not therefore recover, it was observed in each opinion that an indorsement for collection operates to warrant the genuineness of indorsements.

here decided, however, that a bank indorsing a check in this manner was liable to the drawee bank for the amount of the check where it appeared that a prior indorsement was forged, as for money paid under a mistake of fact.⁵³

§51. Conditional Indorsements.—A conditional indorsement is one by which the title to the instrument does not pass until the condition mentioned in the indorsement is fulfilled. An indorsement "Pay A or order if he marries before he is 25 years old," or "Pay B upon completion of the work on my house," would be conditional. Examples of conditional indorsements are rare, and especially so in the transfer of checks.⁵⁴

§52. Instruments Payable to Two or More Persons.—Checks and other negotiable instruments are sometimes made payable to two or more persons. The general rule in such case is that, in order to transfer title all must indorse, unless the parties happen to be partners, in which event one partner has implied authority to indorse for the others. One of several payees may, of course, indorse for all where he has express authority.⁵⁵

53. *First Nat. Bank v. City Nat. Bank*, 182 Mass. 130, 65 N. E. 24.

54. The Negotiable Instruments Law, §69 of the New York Act, provides: "Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee, or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally."

55. *Ryhiner v. Feickert*, 92 Ill. 305; *Cooper v. Bailey*, 52 Me. 230; *Pitcher v. Barrows*, 17 Pick. (Mass.) 361; *Wood v. Wood*, 16 N. J. Law, 428; *Allen v. Corn Exchange Bank*, 87 N. Y. App. Div. 335, 84 N. Y. Supp. 1001; *First Nat. Bank v. Gridley*, 112 N. Y. App. Div. 398, 98 N. Y. Supp. 445; *Foster v. Hill*, 36 N. H. 526; *Hungerford v. Perkins*, 8 Wis. 267.

In *Kaufman v. State Savings Bank*, Mich., 114 N. W. Rep. 863, the controlling rule was thus stated: "If several persons, not partners, are payees or indorsees of a bill or note, it must be indorsed by all of them. Either one of the joint payees may authorize the others to indorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority; but there is no presumption of law that one may indorse for the other."

This rule is expressed in the following words in the Negotiable Instruments Law, Section 71 of the New York Act: "Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others."

One of two joint holders may indorse to the other,⁵⁶ and the indorsement of one of two joint payees, to a third person, while insufficient to pass title, may be subsequently ratified by the other payee.⁵⁷ An instrument, payable in the alternative, to either one of two payees, may be indorsed by either.⁵⁸

§53. Instruments Payable to Officer of Bank.—There are early decisions holding that an instrument made payable to a person as cashier or other officer of a bank, must be indorsed by the designated payee before the bank can bring an action thereon in its own name. These authorities, however, are overruled by the Negotiable Instruments Law, providing that, where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation, it is deemed *prima facie*, to be payable to the bank or corporation, and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.⁵⁹ Under this provision, the indorsement of an instrument to a person as cashier of a bank, treasurer of a savings bank, or secretary of a trust company, would make the instrument payable to the bank.

This section was applied in a case involving the liability of a bank as indorser of a certificate of deposit. The certificate was payable to the order of a person as cashier of the bank, and was by him indorsed and transferred. The bank claimed that it was not liable on the cashier's indorsement, for the reason that the certificate was issued by a firm in which the cashier was a partner, and was used by him for his own personal benefit and not for the benefit of the bank. It was held that, under this section, the situation was the same as though the certificate had been made payable to the order of the bank and indorsed in its name by the cashier. The holder of the certificate having received it in good faith and without notice, was permitted to recover against the bank on the cashier's indorsement.⁶⁰

56. *Logue v. Smith*, Wright (Ohio) 10.

57. *Allen v. Corn Exchange Bank*, 87 N. Y. App. Div. 335.

58. *Union Bank v. Spies*, 151 Iowa 178, 130 N. W. Rep. 928.

59. Negotiable Instruments Law, Section 72 of the New York Act.

60. *Johnson v. Buffalo Center St. Bank*, 134 Iowa 731, 112 N. W. Rep. 165.

For other cases involving instruments payable to the cashier of a bank, see *First National Bank v. Johnson*, 133 Mich. 700; *Lookout*

§54. Effect of Transfer without Indorsement.—The transfer of an instrument payable to order, without indorsement, vests in the transferee such title as the transferor had in the instrument. Thus, where the payee of a check delivered it to the plaintiff without indorsement, the payee dying the next day, and the plaintiff thereafter had the check certified by the bank on which it was drawn, it was held that the plaintiff could recover from the drawee, it appearing that there was no defect in the payee's title to the instrument.⁶¹

In addition to acquiring title to a check transferred without indorsement, the transferee obtains the right to have the indorsement of the transferor, which right may be enforced by appropriate action.⁶²

While the person who receives a check payable to order, without the indorsement of the person to whom it is payable, acquires title to the check, he acquires only such title as the transferor had. In other words, he holds it subject to all

Bank v. Aull, 93 Tenn. 645; *Bank of the State of New York v. Muskingum Branch*, 29 N. Y. 619.

A draft payable to the order of the president of a bank, with the addition after his name of the abbreviation "Pt." is payable to the bank. *Griffin v. Erskine*, 131 Iowa 444, 109 N. W. Rep. 13.

61. *Meuer v. Phenix Nat. Bank*, 94 N. Y. App. Div. 331, *aff'd.*, 183 N. Y. 511; in this case the court said: "That the title to the check could pass by delivery without indorsement is settled beyond dispute and while, by the transfer of the check, its negotiability was destroyed so that the transferee received simply the title that the transferor had, which was subject to any equities that existed between the drawer of the check and the payee, still the title to the check passed by the transfer."

See also *Hopkins v. Manchester*, 16 R. I. 663, 19 Atl. Rep. 243; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. Rep. 197; *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. Rep. 999;

See, however, the case of *Hellerman v. Schantz*, 112 N. Y. Supp. 1094 where it was decided that the holder of a check not indorsed by the payee could not enforce it in an action against the payee.

The Negotiable Instruments Law, Section 79 of the New York Act, provides as follows: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

62. *Brown v. Wilson*, 45 S. C. 519, 23 S. E. Rep. 630; *Schoepfer v. Tommack*, 97 Ill. App. 562.

equities and defenses which might have been urged against the party transferring without indorsement, even though he paid full consideration and had no notice of the existence of any defect in, or defense to, the instrument. He may become a holder in due course of the check by securing a proper indorsement, but his rights as a holder in due course date only from the time of the indorsement and not from the time of the transfer.⁶³

This is illustrated in a New York case wherein the drawer of a check payable to his own order obtained its certification by the drawee bank upon false representations. The drawer then transferred it for value, but neglected to indorse it through an oversight. Before the holder obtained the drawer's indorsement, he was notified by the drawee bank of the fraud. It was held that the indorsement did not relate back to the time of the transfer and that the check was subject to the defense of fraud, notice of which had been given to the holder before he secured the indorsement.⁶⁴

The reasons on which this doctrine is founded may be briefly stated as follows: The general rule is that no one can transfer a better title than he possesses. An exception arises out of the rule of the law-merchant, as to negotiable instruments, It is founded on the commercial policy of sustaining the credit of commercial paper. Being treated as currency in commercial transactions, such instruments are subject to the same rule as money. If transferred by indorsement for value, in good faith and before maturity, they become available in the hands of the holder, notwithstanding the existence of equities and defenses, which would have rendered them unavailable in the

63. *Osgood's Adm'r., v. Artt*, 17 Fed. Rep. 575; *Hays v. Plummer*, 126 Cal. 107, 58 Pac. Rep. 447; *Pavey v. Stauffer*, 45 La. Ann. 353, 12 So. Rep. 512; *Bishop v. Chase*, 156 Mo. 158, 56 S. W. Rep. 1080; *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. Rep. 180; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. Rep. 197.

64. *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. Rep. 180.

It has been held in some cases, such as *Beard v. Dedolph*, 29 Wis. 136 and *Schoepfer v. Tommack*, 97 Ill. App. 562, that where an instrument payable to order is transferred without indorsement, and the indorsement is subsequently obtained, the indorsement relates back to the time of the transfer, so that the instrument is not subject to defenses, notice of which is received by the holder subsequent to the time of the transfer of the instrument. This doctrine, however, has been overruled by the provisions of the Negotiable Instruments Law; see Section 79 of the New York Act.

hands of a prior holder. This rule is applicable only to negotiable instruments which are negotiated according to law-merchant. When such an instrument is transferred without indorsement, it is treated as a chose in action assigned to the purchaser. The assignee acquires all the title of the assignor and may maintain an action thereon in his own name. And like other choses in action it is subject to all the equities and defenses existing against the previous holder.⁶⁵

§55. Where Instrument Negotiated Back to Prior Party.—

Where an instrument is negotiated back to a prior party, that party may, subject to the provisions of the Negotiable Instruments Law, reissue and further negotiate the instrument. But in such case he cannot enforce payment of the instrument against any intervening person to whom he was personally liable.⁶⁶

§56. Order in which Indorsers are Liable.—Indorsers are ordinarily liable, as respects one another, in the order in which they indorse.⁶⁷ Evidence is admissible, however, to establish that the indorsers of an instrument agreed between or among themselves to be liable otherwise than in the order in which they indorsed.⁶⁸

65. *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. Rep. 180.

66. Negotiable Instruments Law, Section 80 of the New York Act.

67. *Kirshner v. Conklin*, 40 Conn. 77; *Haddock v. Haddock*, 118 N. Y. App. Div. 412; 103 N. Y. Supp. 584; *Harrah v. Doherty*, 111 Mich. 175; *Russ v. Sadler*, 197 Pa. 51; *Kelly v. Burroughs*, 102 N. Y. 93.

68. *Goldman v. Goldberger*, 208 Fed. Rep. 877; *Patch v. Washburn*, 82 Mass. 82; *Witherow v. Slaybach*, 158 N. Y. 649; *Bank of Jamaica v. Jefferson*, 92 Tenn. 537.

The Negotiable Instruments Law, Section 118 of the New York Act provides: "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

The order in which irregular indorsers are liable is prescribed by Section 114 of the Negotiable Instruments Law as follows: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

CHAPTER VI.

HOLDERS IN DUE COURSE.

- §57. Rights of Holder in Due Course.
- §58. Presumption and Burden of Proof.
- §59. What Constitutes a Holder in Due Course.
- §60. Holder must Take for Value.
- §61. Holder Must Take Check before Overdue.
- §62. Holder Must Take Check Without Notice of Defect.
- §63. Holder Deriving Title Through Holder in Due Course.
- §64. Bank as Holder in Due Course.
- §65. Payee as Holder in Due Course.

§57.—Rights of Holder in Due Course. One essential distinction between negotiable paper, which includes ordinary bank checks in proper form, and non-negotiable paper is that the holder in due course of a negotiable instrument may enforce it, even though the party whom he seeks to hold might have a valid defense as against some intermediate party. Thus, A gives his check to B in payment for certain goods. B transfers the check to C, who gives value for it and takes it under circumstances which make him a holder in due course, and the goods turn out to be defective. A would have a good defense against B if B brought action on the check, but C, being a holder in due course, is entitled to recover from A, notwithstanding B's breach of contract. If, for some reason, the check involved were non-negotiable, C, the purchaser of the check, could not recover from A, the drawer. His being a holder in due course would not help him in such case. He would take the instrument just as he would take any other contract by assignment, subject to any defenses that A might have against B.

Not every defense can be overcome by the holder in due course of a negotiable instrument. In general it may be said that defenses are divided into real and personal defenses. Real defenses are those which attach to the instrument itself and are

good as against all persons, even holders in due course. Common real defenses are the incapacity of the defendant to make the contract, as where the defendant is an infant, a lunatic, or, in some states, a married woman; or the illegality of the contract, as where it is declared void for alteration or usury. The theory is that, where there is a real defense, the contract cannot be enforced for the reason that there is no contract to enforce. The personal defenses most frequently met with are fraud, duress, want of consideration, failure of consideration, payment, etc., and these defenses may not be set up against a holder in due course.

The drawer of a check cannot defend an action brought by a holder in due course on the ground that the check was delivered by the drawer's clerk to the payee without authority,¹ nor that it was diverted from the purpose for which it was intended, and the proceeds fraudulently appropriated by the person to whom it was entrusted for specific purposes.²

It is generally held that the fact that a negotiable instrument is obtained under duress is not a defense, when the action thereon is brought by a holder in due course.³ And it is no defense in an action against the drawer of a check by a holder in due course that no consideration for the check passed between the payee and the drawer,⁴ or that there was a failure of consideration,⁵ or that the check was obtained by fraud.⁶

1. In *Buzzell v. Tobin*, 201 Mass. 1, 86 N.E. Rep. 923, it appeared that the defendant's clerk delivered a check drawn by the defendant to the payee without authority. The check was afterwards negotiated to the plaintiff for value without notice. It was held that the plaintiff, being a holder in due course, a delivery to the payee was conclusively presumed and that the holder could recover thereon notwithstanding the wrongful delivery. As to the presumption of consideration, see §25, 26.

2. *Johnson v. Harrison, Ind.*, 97 N. E. Rep. 930.

3. *Veach v. Thompson*, 15 Ia. 380; *Farmers' Bank v. Butler*, 48 Mich. 192, 12 N. W. Rep. 36; *Clark v. Pease*, 41 N. H. 414; *Loomis v. Ruck*, 56 N. Y. 462; *Keller v. Schmidt*, 104 Wis. 596, 80 N. W. Rep. 935.

As to the validity between the immediate parties of a check given under duress, see §34.

4. *Albert v. Hoffman*, 64 Misc. Rep. (N. Y.) 87, 117 N. Y. Supp. 1043.

As to necessity for consideration between the immediate parties to a check and the question of consideration generally, see Chapter IV.

5. *Frazier v. Trow's P. & B. Co.*, 24 Hun. (N.Y.) 281; *Bank of Saluda v. Feaster*, S. C., 68 S. E. Rep. 1045.

6. *Boles v. Harding*, 201 Mass. 103, 87 N. E. Rep. 481.

In regard to instruments obtained by fraud, the law makes a distinction between the case where a defrauded party at the time of signing is aware of the nature of the instrument, but is induced to sign and deliver it upon fraudulent representations made by the payee, and the case in which the defrauded party is induced to sign in the belief that he is signing an instrument of some other character, as a voucher or receipt. In cases of the first class, the party signing has no defense against a holder in due course of the instrument. But in cases of the second class, the minds of the parties never meet; the defrauded party believes that he is signing an instrument different in effect from the one which he actually does sign, while the defrauder is aware of the exact nature of the instrument being signed. Under these circumstances it is generally held that the person signing is not a party to the instrument signed and cannot be held liable on it even by a holder in due course, unless he is estopped by his own negligence. There seems to be no reason why this doctrine, which is usually applied in cases of promissory notes obtained by fraud, should not apply with equal force to bank checks.

One question upon which the courts will probably never agree is the right of a holder in due course of a check given in a gambling transaction to recover thereon. The fact that this matter is regulated to a certain extent by state statutes of varying import is largely responsible for the variety of the conclusions which have been reached by the courts on this question. The courts of some of the states permit the holder in due course to recover thereon even though the check was given in a gambling transaction,⁷ while the other courts deny that right,⁸ unless the

7. *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599, 70 Atl. Rep. 876; *Matlock v. Scheuerman*, Oregon, 93 Pac. Rep. 823.

Ash v. Clark, 32 Wash. 390, 73 Pac. Rep. 351. This case was decided under Section 7267, 2 Ballinger's Annotated Codes and Statutes, expressly providing that all bills, notes and other securities, based upon a gambling consideration are void except in the hands of holders in good faith without notice.

As to the validity between the immediate parties of a check given in a gambling transaction, see §33.

8. In *Irwin v. Marquette*, 26 Ind. App. 383, 59 N.E. Rep. 38, it appeared that Marquette and one Bedgood played at cards and Bedgood won \$400 from Marquette. Marquette gave his check for this amount which check Bedgood indorsed to Irwin for value. The suit was by Irwin against

drawer himself, by a promise of payment, induces the purchase of the check. In such a case the drawer is estopped, as against an innocent purchaser, from setting up the defense that the check arose out of a gambling transaction.⁹

The Negotiable Instruments Law¹⁰ provides that "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." This section, however, has not settled the law as to the rights of holders in due course of negotiable paper given in payment of a gambling debt, for the courts have given it conflicting interpretations. In the District of Columbia it was held that, under this section, a promissory note might be enforced against the maker by a holder in due course even though it was given for a gambling debt, and that this provision repealed an earlier statute declaring such paper void.¹¹ On the other hand it has been held in Kentucky that this section applies only to paper that might have been obligatory between the parties to it, and that it does not empower any holder, even a holder in due course, to recover on a note given for a gambling debt.¹²

Marquette. The decision of the court that Irwin, though a bona fide holder, could not recover on the check from the drawer was based on section 4950, Revised Statutes of 1897, which reads as follows: "All notes, bills, bonds, conveyances, contracts, mortgages or other securities made hereafter, when the whole or any part of the consideration thereof shall be for money or other valuable thing won on the result of any wager, or for repaying any money lent at the time of such wager for the purpose of being wagered, shall be void."

9. *Hurlburt & Sons v. Straub*, 54 W. Va. 303, 46 S. E. Rep. 163.

10. §96 of the N. Y. Act.

11. *Wirt v. Stubblefield*, 17 App. Cas. (D. C.) 283. In the opinion it was said: "The great object sought to be accomplished by the enactment of the statute, was to free the negotiable instrument, as far as possible from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute, as against the original maker or acceptor."

12. *Alexander v. Hazelrigg*, Ky., 97 S. W. Rep. 353, where it was said: "It has been the policy of this State to suppress gaming; and the statutes making gaming contracts void were founded upon what the legislature has for many years deemed to be sound public policy. It is not conceivable that the General Assembly, in the passage of the Act of 1904, (Negotiable

§58. Presumption and Burden of Proof.—There is a presumption to the effect that the holder of a negotiable instrument is a holder in due course, which presumption may, of course, be rebutted by proof to the contrary. The holder therefore, does not have to establish in the first instance that he is a holder in due course in order to be entitled to recover on the instrument. This is presumed from his production of the instrument. But, when it is shown that the title of any person who has negotiated the instrument was defective, in other words, when the party against whom the action is brought has a defense, then the burden is on the holder to establish by proof that he is a holder in due course, or that some person under whom he claims was a holder in due course. If he is unable to show that one of these situations exists, and cannot overcome the defense interposed, then he cannot recover on the instrument.¹³

§59. What Constitutes a Holder in Due Course.—The law has laid down certain standards by which to determine whether the holder of a check, or of any negotiable instrument, is a holder in due course. To come within the meaning of that term it must appear that the holder received the instrument before it was overdue, paid value for it and received it in good faith without notice of any infirmity in the instrument or defect in the title of the person negotiating it.¹⁴

Instruments Law), for the protection of innocent holders of negotiable instruments, intended to or did repeal section 1955, Ky. St. 1903, which declares all gaming contracts void. In our opinion the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the State as the removal of the ban from gaming contracts."

13. *Packard v. Figliuolo*, 114 N. Y. Supp. 753.

The Negotiable Instruments Law, §98 of the New York Act, provides as follows: "Every holder is deemed *prima facie* to be a holder in due course but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the titled as a holder in due course. But the last-mentioned rules does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

14. The Negotiable Instruments Law, §91 of the New York Act, provides as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

§60. Holder Must Take for Value.—The holder of a check is not a holder in due course unless he paid value for it. Value may be defined as any consideration sufficient to support a simple contract.¹⁵ If the holder received the check without giving any consideration therefor, as where the check was delivered to him as a gratuitous loan or gift, he is not a holder in due course and the check in his hands is subject to equities.¹⁶ It is not necessary, however, that face value should be given for the check; the holder may be a holder in due course though he paid less than the face value of the check.¹⁷

It cannot, of course, be stated with any degree of certainty just what proportion of the face value of a check the purchaser must pay in order that he may declare on the check as a holder in due course. Checks are rarely transferred at less than the amounts for which they are drawn. If the check is good the person in possession of it can always collect the full amount and the very fact that he offers it at less than its face value, unless there is some apparent reason for his so doing which in no way involves the integrity of the check, should at least arouse the suspicion of the person to whom it is offered that there is some defect in the instrument. However, mere suspicious circumstances are not sufficient to deprive a purchaser of negotiable paper of the rights of a holder in due course, and it would probably be held that the purchaser of a check is a holder in due course, notwithstanding that he paid less than the face value of the check unless the sum paid was so grossly inadequate as to clearly indicate a want of good faith on his part.

1. That it is complete and regular upon its face.

2. That he became the holder before it was overdue and without notice that it had been previously dishonored, if such was the fact.

3. That he took it in good faith and for value.

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

The Wisconsin statute adds a fifth requirement namely, "that he took it in the usual course of business."

15. Negotiable Instruments Law, §51 of the N. Y. Act.

16. *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592; *Rosenthal v. Parsont*, 110 N. Y. Supp. 223.

As to the right of the payee of a check, delivered to him as a gift, to enforce it, see §36, Gift of Check.

17. *Rosenthal v. Freedman*, 53 Misc. Rep. (N. Y.) 595, 103 N. Y. Supp. 714.

The release of an antecedent or pre-existing debt by the indorsee of a check is a sufficient parting with value to constitute him a holder in due course.¹⁸ Prior to the adoption of the Negotiable Instruments Law there was a conflict of authority as to whether a pre-existing debt was a consideration sufficient to constitute the purchaser of negotiable paper a holder in due course. That conflict has been settled by the provision of the statute that "an antecedent or pre-existing debt constitutes value."¹⁹

§61. Holder Must Take Check Before Overdue.—Another essential characteristic of a holder in due course of a check is that he must have become the holder of the check before it was overdue. In the case of a bill or note payable at a specified time the holder must be able to show that it was negotiated to him before maturity or he cannot claim as a holder in due course. But a check being payable immediately on demand, no definite rule can be laid down as to when it becomes overdue, or stale, as such a check is called in banking parlance.

This requirement, that a check must be taken before it is overdue, is not to be confused with the rule requiring the presentment of a check for payment, or the forwarding of it, where it is drawn on an out of town bank, not later than the day after its receipt. If presentment is not made in accordance with this rule the drawer is discharged to the extent of any loss he may have suffered as a result of the delay, such loss being usually sustained because of the failure of the drawee bank.²⁰

There are cases where the presentment of a check for payment is unreasonably delayed, but where the drawer suffers no loss as a result of the delay. The drawer in such a case, though he may have suffered no loss as a result of the delay, may have a defense to the check, such as fraud or want of consideration, and the holder's right to recover in spite of such defense, will then depend upon whether or not he is a holder in due course, which involves his having received the check before it was overdue.²¹

The time when a check becomes overdue depends largely on

18. *Third Nat. Bank v. Poe*, 5 Ga. App. 113, 62 S. E. Rep. 826; *Johnson v. Harrison, Ind.*, 97 N. E. 930.

19. *Neg. Inst. Law*, §51 of the New York Act.

20. See *Presentment for Payment*, §77.

21. *Johnson v. Harrison, Ind.*, 97 N. E. Rep. 930.

the particular circumstances of the case in which the question arises. It has been held that a check purchased seven days after its date was not overdue²² and also that a check negotiated five months after its date was not open to defenses.²³ On the other hand it has been held that, where a check was retained for twenty six days and then indorsed to the plaintiff, it had become stale as a matter of law, and that the drawer could defend the plaintiff's action on the ground that the check had been given without consideration.²⁴

It is the delivery of a check, and not its date, which governs the question whether it is overdue, the reason being that the

22. In *Citizens' State Bank v. Cowles*, 89 N.Y. App. Div. 281, involving a check negotiated seven days after the date of its issue, the court said: "What is a reasonable length of time for such instruments to run before they are to be thus deemed overdue or dishonored as a matter of law is not fixed. All we have to go by is that regard must be had to the nature of the instrument and the facts of the particular case, and where the facts are undisputed and different inferences cannot reasonably be drawn from them, the question is one of law. * * * I have been referred to no text-writer or decision holding that a check is on the fourth or fifth day after its delivery, or on the sixth or seventh, to be deemed as matter of law overdue or presumptively dishonored, so as to let in against a transferee who then takes it, defenses existing between the drawer and payee. A recurrence to the decisions and authorities will show that a much longer time is held to be insufficient for that purpose."

A check negotiated within two days after its date is not overdue. *Asbury v. Taube*, Ky., 151 S. W. Rep. 372.

A cashier's check, negotiated five days after its date, is negotiated within a reasonable time and is not overdue. *Singer Mfg. Co. v. Summers*, 143 N. C. 102.

The Negotiable Instruments Law, §92 of the New York Act, provides that "where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

23. *Bull v. First Nat., Bank* 123 U. S. 105. On October 15, 1881, a Minnesota bank issued its drafts or checks on its New York correspondent to the order of a designated payee, who immediately indorsed them to one E at Kasson. E negotiated them to the plaintiff for value at Quincy, Ill., on March 4, 1882, and the plaintiff immediately presented them for payment. Payment was refused and the plaintiff brought suit against the drawer. The question presented was whether the checks were to be regarded as overdue so as to admit a defense good as against E. It was held that the checks were not overdue.

24. *Farmers' Nat. Bank v. Dreyfus*, 82 Mo. App. 399.

One who purchases a check a year after its date takes it subject to equities. *Lancaster Bank v. Woodward*, 18 Pa. 357.

check has no inception until it is delivered to the payee. Thus, where a check is delivered to the payee long after its date and is promptly negotiated by the payee, the purchaser is a holder in due course, so far as the time of his acquiring title to the check is concerned. The check in one instance was dated March 8, 1871, drawn by Altman, payable to Holbrook and indorsed by him. Altman, the drawer, gave the check to Bowen the day of its date, under an agreement that it was to be held by Bowen for safe keeping and delivered to Holbrook only when he was discharged in bankruptcy. Bowen held the check until May 2, 1872 and then delivered it to Clark upon Holbrook's order. Clark the same day negotiated it to the Marine Bank of Buffalo. The check was protested May 3, 1872 and subsequent to protest it was transferred to Cowing, the plaintiff. The check was void in the hands of the payee because of illegality of consideration. In a suit by plaintiff against the drawer, it was held that the plaintiff could recover.²⁵

25. *Cowing v. Altman*, 71 N. Y. 435. In the opinion it was said by the court: "That such a lapse of time between the date and the transfer of the check affords a just presumption of dishonor, cannot we think, be doubted. The date of a note or check is *prima facie* evidence of the time it was made and its inception. And a check found in the hands of the payee or third person fourteen months after its date, in the absence of explanation, must be deemed to be discredited. It would not necessarily be implied, from the mere lapse of time, that a check has been dishonored in fact; that is, that it had been presented and that payment had been refused, or that it was overdue in a strict sense. Usually no time of payment is expressed. It is payable presently, but the holder must in general demand payment of the drawee before he can sue the drawer and the statute of limitations runs from that time. But the retention of a check by the holder for a considerable time, without presentment, where no defense exists to it is unusual and this circumstance is sufficient to put a party taking it upon inquiry, and a check dated, as in this case, several months before its transfer, and which might have been presented at or soon after its date will, in the absence of explanation, be treated as overdue and dishonored whether it has actually been presented or not, so as to let in defenses existing between the drawer and payee."

But in this case, the court showed, the check had no inception until it was delivered and it was not delivered at the time of its date. When the bank took it, it appeared to be overdue and the bank took the risk of the apparent fact being the real fact; but when it turned out that it was issued on the day it was negotiated, the bank was in no worse position than if it had first inquired and been informed of the date of its issue. The bank was, therefore, a holder without notice and plaintiff was entitled to recover.

§62. Holder Must Take Check without Notice of Defect.—

The holder of a check, to be a holder in due course and entitled to the rights of such a holder, must have taken the check in good faith and without notice of any infirmity or defect in the instrument. If he takes the check at a time when he has actual knowledge that the check was obtained from the drawer by fraud or duress, or with knowledge of other circumstances which would constitute a defense as between the immediate parties, then one of the essential characteristics of a holder in due course is lacking, and the defense may be interposed against him. It is frequently impossible for the drawer to show actual knowledge on the part of a holder, and it is not essential that he should do so, for knowledge may be imputed to the holder from the facts surrounding the negotiation of the check to him. The difficulty lies in determining just what facts, known to the purchaser, will constitute notice. The early doctrine on this subject was that the circumstances which ordinarily would excite the suspicion of a reasonably prudent and careful man were sufficient to put the party receiving negotiable paper upon inquiry as to defects in the instrument or in the title of a prior holder. This rule eventually gave way to what has been called the modern doctrine that neither knowledge of suspicious circumstances, nor doubts as to the genuineness of the title, nor gross negligence on the part of the purchaser, either singly or together, are sufficient to defeat the holder's recovery unless amounting to proof of want of good faith.²⁶

26. *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. Rep. 45. In this case one Cable, in paying promissory notes drawn by him individually, delivered to the holder of the notes, checks signed by him as treasurer of a corporation. In an action by the receiver of the corporation against the payee of the checks to recover the money received on the checks, in which it was held that the defendant was not liable, the court said: "Having taken before maturity for a valuable consideration, negotiable paper which was regular upon its face, without knowledge of any defect in the title, even if there might have been circumstances which would have raised doubts in the mind of a more prudent person, the defendant's right to retain the proceeds of the checks cannot be divested without proof that she knew, or in the face of facts sufficient to put her upon inquiry, purposely refrained from knowing of the fraud of Cable." But see p. 84-87.

The Negotiable Instruments Law, §95 of the New York Act, provides as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it

The purchaser of a check is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicions of wary vigilance, or to watch for facts which might put a cautious man on his guard. He does not owe to the party who issues the check the duty of active inquiry in order to avoid the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The rights of the holder cannot be defeated without proof of actual notice or bad faith on his part.²⁷ Thus, where a check indorsed in blank was lost, and within a week after its issue was received by a merchant for value, from a person whom he did not know, but assumed to be the payee named in the check, he was held to be a holder in due course.²⁸

The purchaser of a check may be deemed to have knowledge of facts sufficient to impugn his good faith where the check is in such form as to challenge his inquiry. Where a mere inspection of a check disclosed that its date had been altered, it was determined that a purchaser thereof was not a holder in due course and so could recover nothing on the check.²⁹ Had the

is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

27. *Third Nat. Bank v. Poe*, 5 Ga. App. 113, 62 S. E. Rep. 826; *Asbury v. Taube*, Ky., 151 S. W. Rep. 372; *Davis v. Clark*, N. J., 90 Atl. Rep. 303; *Cheever v. Pittsburgh, S. & L. E. R. Co.*, 150 N. Y. 59, 44 N. E. Rep. 701; *Siegmeister v. Lispenard Realty Co.*, 107 N. Y. Supp. 158; *Goetting v. Day*, 87 N. Y. Supp. 510; *Ketcham v. Govin*, 35 Misc. Rep. (N. Y.) 375, 71 N. Y. Supp. 991.

Where a husband who is a customer of a bank, and who is indebted to it by a past-due note, brings into the bank the cashier's check of another bank payable to his order, indorses it, places it to his deposit account, and gives his personal check thereon in settlement of his note due the bank, the bank, in the absence of *mala fides*, is not subject to an action by his wife to recover the value of the cashier's check, although it was obtained with her money, and although the bank so accepting it has cause to suspect that the wife was in some way instrumental in procuring it for her husband. *Third Nat. Bank v. Poe*, 5 Ga. App. 113, 62 N. E. Rep. 826.

28. *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. Rep. 655.

29. *Elias v. Whitney*, 50 Misc. Rep. (N. Y.) 326, 98 N. Y. Supp. 667.

Where a certified check was marked by the drawee bank with two stars, indicating that it had been paid, but the money was afterwards refunded and the check returned to a member of the payee firm, who 14 months later transferred it to the plaintiff, it was held that the plaintiff was put

purchaser been a holder in due course, as he would have been if the alteration had been made so as to defy detection, he would have been permitted to recover on the check according to its original tenor.³⁰

The purchaser of a check must also take warning when the check is payable to a corporation and is offered by an officer of the corporation in payment of his personal debt. In one case a trust company, which had loaned \$125,000 to two persons, Umsted and Kiefer upon their note, accepted in payment of the note, a check payable to the Hartman Company, a corporation, of which Umsted was President and General Manager. The check was indorsed in the name of the company by Umsted as its president. The Hartman Company afterwards became insolvent. The question presented was, whether the \$125,000.00 received by the trust company could be recovered as an asset belonging to the estate.³¹ The purchaser of a check is also

upon notice and was not a holder in due course. *Silverman v. National Butchers' and Drovers' Bank*, 98 N. Y. Supp. 209. The court did not refer in particular to the effect of the two stars stamped on the check, but said: "Without going into all the particulars, we may say that, under the circumstances attending the transfer of the check to the plaintiff, we think that he was put on his notice that there might be defenses."

30. See *Altered Checks* §126.

31. *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. Rep. 585. In the opinion it was said: "The presumption arising from the face of the check was that it belonged to the Hartman Company, and that its president had no right to use it to pay his personal debt. The purpose of the law in exacting inquiry under such circumstances is to see whether the apparent situation is the actual situation, or, in other words, to learn whether facts exist to rebut the presumption. The object is not to discover negative facts, or such as would not arouse suspicion, but positive facts which would allay the suspicion already aroused. If, for instance, reasonable inquiry had been made by the trust company, and the result had tended to show that the check really belonged to Umsted and Kiefer and not to the Hartman Company, or that Umsted was authorized by that company to use it as he proposed, then, even if the fact were otherwise, such inquiry would have tended to rebut the presumption of illegal use, and to protect the title of the trust company. The law goes further than this in order to promote the transfer of commercial paper, for it is settled that if no inquiry is in fact made to dispel the presumption, but reasonable inquiry would have led to the discovery of facts which would have dispelled it, the purchaser of the paper is entitled to the benefit thereof the same as if he had learned them by proper investigation. *Wilson v. Metropolitan Elev. Ry. Co.*, 120 N. Y. 145, 153. This benefit, however, carries with it the burden of responsibility for such unfavorable facts as reasonable inquiry would have

put on inquiry where the check is signed by an officer of a corporation in his corporate capacity and is offered in settlement of the officer's individual obligation. In one instance it appeared that The Manhattan Web. Co. of New Jersey was a depositor in the Aquidneck National Bank of Rhode Island. Its treasurer drew a corporation check to his individual order and indorsed it to the bank with directions to apply on six notes held by the bank, four of which represented his personal indebtedness, the remaining two being notes of the Manhattan Web. Co., which was a New York corporation with similar name. It was held that the bank was liable to the corporation for such amount of the check as was applied on the four notes owing by its treasurer individually, but not for the remaining amount of the check applied on the notes of the corporation.³²

discovered in relation to the defect that made the inquiry necessary. *Cohnfeld v. Tanenbaum*, 176 N. Y. 126, 130; *Rochester & Charlotte Turnpike Road Co. v. Paviour*, 164 N. Y. 281, 286; *Seger v. Farmers' Loan & Trust Co.*, 187 N.Y., 314-319. In the case before us no inquiry was made, although the check was for so large an amount as to induce a prudent man to proceed with caution. The transaction upon its face involved a gift to Umsted and Kiefer, or the theft by them, of a large portion of the assets of the Hartman Company, and under such extraordinary circumstances reasonable inquiry meant one prosecuted with a degree of diligence adapted to those circumstances. Inquiry of Umsted and Kiefer would not have satisfied the requirement, for it was apparent that they were acting in their own interest, and hence beyond the general scope of their authority."

Where an agent, authorized to indorse for deposit checks payable to his principal, indorsed such a check in payment of expenses incurred in the principal's business, receiving the balance in cash, it was held that the indorsee was not put upon inquiry and was a holder in due course. *Cluett v. Couture*, 14 N. Y. App. Div. 830, 125 N. Y. Supp. 813.

32. *Manhattan Web Co. v. Aquidneck Nat. Bank*, 133 Fed. Rep. 76. In the opinion the court said: "The plaintiff contends that it is well settled as a matter of law that, where an agent draws a corporation note or check payable to himself, and uses it to pay his individual debts or debts of third parties, the payee takes with notice of the fraud, and the burden is cast upon him to establish by proof that the act was authorized or ratified by the corporation; citing the following cases: *Rochester & Charlotte Turnpike Road Co. v. Paviour*, 164 N. Y. 281; *Campbell v. Manufacturer's Nat. Bank*, 67 N. J. Law 301; *Gale v. Chase Nat. Bank*, 104 Fed. 214; *Cohnfeld v. Tanenbaum*, 176 N.Y. 126; *Randall v. R.I.L. Co.*, 20 R.I. 625; *New York I. Mine v. First Nat. Bank*, 39 Mich 644; *Reynolds El. Co. v. Merchants' Nat. Bank*, 55 App. Div. 1; *Gerard v. McCormick*, 130 N. Y.

In general the purchaser is put upon inquiry wherever the form of a check indicates that an agent is using the funds

261. While there is a question whether this rule is not too broadly stated, since perhaps it would not be an unusual business transaction for a treasurer to draw corporate funds for his own salary, and to deposit them in his own account subject to check for his private bills, yet the cases cited are at least sufficient to justify the propositions that, where a treasurer of a corporation draws and uses its funds for private purposes, in the absence of circumstances giving rise to a reasonable inference of authority to do so, the bank is put upon inquiry; and that a presumption of a treasurer's authority to apply corporate funds to his private purposes does not arise from the mere fact that he does so apply them."

In *Coleman v Stocke*, 159 Mo. App. 43, 139 S. W. Rep. 216, it was said: "Where one receives the check of a corporation on its private funds in payment of the individual debt of the officer of the corporation who drew the check, or in payment of a debt for which such officer is obligated, he is *prima facie* chargeable with notice that such officer is not authorized to use the corporation funds for that purpose, and is bound to inquire as to the real situation. In other words, where such a creditor of the officer of a corporation so receives the check of the corporation for such individual debt and draws the money thereon, he does so at his peril, and is liable to account therefor in an action by the corporation itself, and, of course, in the event of its bankruptcy, at the suit of the trustee in bankruptcy, who succeeds to the rights of the corporation in the premises for the benefit of its creditors. The law will not permit corporate funds to be thus misapplied by its officers for the individual benefit of its officers, and conclude the matter as an innocent transaction, when it appears the very medium by which the payment was made conveys notice on its face to the creditor of the individual officer that the funds employed are those of the corporation."

Where the president of a corporation pays his individual debts with a check signed by him as president of the corporation, the creditor is thereby put on notice as to the appropriation by the president and is bound to restore the amount to the corporation. *St. Louis Charcoal Co. v. Lewis*, 154 Mo. App. 548, 136 S. W. Rep. 716. The following is quoted from the opinion: "No one has a right to pay his debt with another's check, unless he shows that the other has given him such authority. This may not be true in case of the use of money which overpowering necessity requires shall be allowed to pass current from hand to hand without making inquiry from whence it came. In this case the check was drawn on the account of the corporation, by the president, for the payment of his individual debt. The face of it carried notice of its irregular and illegal character, and, if used by the creditor, he runs the risk of being called upon to restore it."

See also *Johnson-Kettell Co. v. Longley Co.*, 207 Mass. 52, 92 N. E. Rep. 1035; *Kelsey v. Bank of Mansfield*, 85 N. Y. App. Div. 234, 83 N. Y. Supp. 281.

Contra, *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. Rep. 45,

of his principal for an unauthorized purpose.³³ There is a shadow on all such checks. The face of a check of this kind carries on it notice of its irregular character and the illegal use which is being made of it, and, in taking it without inquiry, the purchaser voluntarily places himself in a position where his good faith may be questioned. Bad faith does not necessarily involve furtive motives, for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who, to quote from the New York Court of Appeals, "owed him nothing, in payment of a claim that he held against some one else. * * * Even if his actual good faith is not questioned, if the facts shown to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the law will withhold from him the protection that it would otherwise extend."³⁴

The indorsee of a check is not put upon inquiry by the fact that a check is postdated and is negotiated to him prior to its date,³⁵ nor by the fact that it is a memorandum check.³⁶ A request by the indorser of a check at the time of the transfer that the indorsee hold the check for a few days before presenting it and the consent of the indorsee to such arrangement does not charge the indorsee with notice or put him upon inquiry.³⁷

It is specifically provided in the Negotiable Instruments Law³⁸

where it was held that the holder of promissory notes, who received in payment thereof checks, signed by the maker as treasurer of a corporation, was a holder in due course of the checks.

33. *Gerard v. McCormick*, 130 N. Y. 261; *Jacoby v. Payson*, 85 Hun. (N. Y.) 367.

A drew a check on the X bank payable to Y bank, and delivered it to B to have the payee bank collect the check for him, A. B, however, deposited the check in the payee bank to his own credit and withdrew the proceeds. It was held that the form of the check was notice to the payee bank of A's interest therein. *Kuder v. Greene*, 72 Ark. 504, 82 S. W. Rep. 836.

34. *Rochester & C. T. R. Co. v. Paviour*, 164 N. Y. 281.

35. *Johnson v. Harrison, Ind.*, 97 N. E. Rep. 930; *Symonds v. Riley*, 188 Mass. 470, 74 N. E. Rep. 926; *Albert v. Hoffman*, 117 N. Y. Supp. 1043.

36. *Johnson v. Harrison, Ind.*, 97 N. E. Rep. 930.

37. *Johnson v. Harrison, Ind.*, 97 N. E. Rep. 930; *Matlock v. Scheuerman*, Oregon, 93 Pac. Rep. 823.

38. §91 of the New York Act.

that a holder in due course is one who took the instrument without notice that it had been previously dishonored, if such was the fact, and it has been held that one who received a check, with knowledge that the drawee bank had refused payment of it because of lack of funds, was not a holder in due course and that the defense of want of consideration was good as against him.³⁹

While ordinarily notice to a partner is notice to the firm, yet if the notice relates to an individual transaction of the notified partner, or to one outside of the scope of the firm business, it will not be imputed to his copartners.⁴⁰

§63. Holder Deriving Title Through Holder in Due Course.—There is one class of holders of negotiable paper, who, although they are not holders in due course, are permitted to deal with the paper as though they had received it before maturity, for value and without notice. The class referred to is that class, the members of which derive their titles through holders in due course. To express it differently, the purchaser of a check from a holder in due course acquires a valid title to the check, even though he had at the time of the transfer actual notice of defenses which might have been available against the original payee. The theory of the law is that a holder in due course may deal with the paper on the basis of his own valid title and transfer that title and all its appurtenant rights to whomsoever may purchase.⁴¹ This does not, however, permit a payee, or other party, whose title is defective, to better it by selling the instrument to a holder in due course and buying it back again.⁴²

39. *Frank v. Wolff*, 125 N. Y. Supp. 530.

40. *Flynn v. Bank of Mineral Wells, Tex.*, 118 S. W. Rep. 848. In this case the drawer of a check notified the president of the drawee bank to stop payment. The check was later negotiated to a firm, of which the president of the bank was a member. It was held that the notice to the president, who had no knowledge of the purchase of the check by his firm, was not notice to the firm.

41. *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 124 N. W. Rep. 236.

The Negotiable Instruments Law, §97 of the New York Act, provides: "A holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter."

42. *Andrews v. Robertson*, 111 Wis. 334, 87 N. W. Rep. 190.

§64. Bank as Holder in Due Course.—The question frequently arises whether a bank is a holder in due course of a check deposited with it by one of its customers. As a general rule the title to paper deposited with a bank for collection in the ordinary course of business does not pass to the bank. The title remains in the depositor and the bank does not become a purchaser of the paper.⁴³

If the bank does not actually part with value one of the elements of a holding in due course is lacking. The mere crediting of a check to the account of the depositor upon the books of the bank does not, in the absence of special agreement, make the bank a holder in due course. When such paper is dishonored the bank may charge the amount back to the depositor without taking the steps necessary to charge him as indorser. The relation arising from such a transaction as between the bank and the depositor is that the former becomes the agent of the latter for the purpose of collection.⁴⁴ But, where the bank allows the depositor to draw against the deposit, it pays value and may be a holder in due course of the check deposited.⁴⁵ If a bank permits the depositor of a check to draw a portion of the amount of the check it is a holder in due course to the extent of the amount thus paid.⁴⁶ It cannot, however, become a holder in

43. *Bailie v. Augusta Sav. Bank*, 95 Ga. 277, 21 S. E. Rep. 717; *Yerkes v. National Bank of Port Jervis*, 69 N. Y. 382.

On this question generally see, *infra*, §212-220.

44. *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231; *Citizens State Bank v. Cowles*, 180 N. Y. 346, 73 N. E. Rep. 33; *National Bank of Phoenixville v. Bonsor*, 38 Pa. Super. Ct. 275.

45. *Symonds v. Riley*, 188 Mass. 470, 74 N. E. Rep. 926; *Jefferson Bank v. Merchants' Refrigerating Co., Mo.*, 139 S. W. Rep. 545.

46. *National Bank of Phoenixville v. Bonsor*, 38 Pa. Super. Ct. 275; *Bank of Saluda v. Feaster*, S. C., 68 S. E. Rep. 1045.

In *Southwest Nat. Bank v. House*, 172 Mo. App. 197, 157 S. W. Rep. 809, the payee of a check for \$5,240, who had obtained it from the drawer by fraud, indorsed it and deposited it in the plaintiff bank in which he had opened an account a few days before. The plaintiff bank allowed the payee to draw against this check to the extent of \$640 at the time of deposit. The check, instead of being turned over to the bookkeeper, was delivered to the collection teller and immediately sent around to the bank upon which it was drawn for certification, which however was refused. It was held under these circumstances, that the bank was not an innocent purchaser for value and that it could not recover from the drawer of the check even the amount which it had allowed him to draw.

due course by reason of a payment made to the depositor after it has received notice that the drawer has a defense to the check.⁴⁷ In a case where a bank has actually become a holder in due course of a check it will not be permitted to recover against the drawer if it appears that the depositor thereafter paid the money back to the bank and that the bank was suing merely for the benefit of the depositor.⁴⁸ The deposit of a check in the bank on which it is drawn does not make such bank a holder in due course. The payment of a check by the drawee bank discharges it and the drawee cannot, by thereafter putting it in circulation, create any liability thereon against the drawer or prior indorsers.⁴⁹

§65. Payee as Holder in Due Course.—The payee of a check may be a holder in due course, and as such entitled to enforce it against the drawer. Such a situation is found in a case where the drawer hands a check to a person for delivery to the payee and such person delivers it to the payee in payment of his own indebtedness to the payee.⁵⁰

47. *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231; *Bank of Saluda v. Feaster*, S. C., 68 S. E. Rep. 1045.

48. *Choteau Trust & Banking Co. v. Smith*, Ky., 118 S. W. Rep. 279.

49. *Aurora State Bank v. Hayes-Eames Elevator Co.*, Neb., 129 N. W. Rep. 279. See also *First Nat. Bank v. Bank of Cottage Grove*, Oregon, 117 Pac. Rep. 293; *National Bank of Commerce v. Farmers' & Merchants' Bank*, Neb., 128 N. W. Rep. 522.

50. *Boston Steel Co. v. Steuer*, 183 Mass. 140, 66 N. E. Rep. 646; *Rutland Provision Co. v. Hall*, 71 Vt. 208.

In *Boston Steel Co. v. Steuer*, 183 Mass. 140, 66 N. E. Rep. 646, it was said: "A check payable to the plaintiff is handed by the drawer to her husband, to be delivered by him to the plaintiff in payment of a debt to become due from the drawer of the check to the payee, and is fraudulently handed by the husband to the payee of the check in payment of a debt due from him to the payee, and is accepted by the payee in good faith in payment of that debt. In such a case the payee of the check is a bona fide purchaser of the check for value, without notice, and the drawer could not set up her husband's fraud in defense of the check, nor maintain an action for money had and received after payment of it on discovering the fraud."

CHAPTER VII.

PRESENTMENT FOR PAYMENT.

- §66. Necessity for Presentment of Check for Payment.
- §67. By Whom Presentment May be Made.
- §68. To Whom Presentment May be Made.
- §69. Manner of Presentment.
- §70. Forwarding Check by Mail.
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- §72. Time of Presentment of Check for Purpose of Charging Drawer.
- §73. Time of Presenting Check on Out-of-Town Bank.
- §74. Circuitous Routing of Checks Deposited for Collection.
- §75. Presentment of Check Through Clearing House.
- §76. Presentment where Payee has Reason to Believe that Drawee is in Bad Financial Condition.
- §77. Drawer Discharged by Failure to Present only where Loss Occurs.
- §78. Discharge of Indorser of Check.
- §79. Presentment of Banker's Check.
- §80. Presentment of Certified Checks.
- §81. Time of Day when Presentment May be Made.
- §82. Time of Presentment of Postdated Check.
- §83. When Presentment not Required to Charge Drawer.
- §84. When Presentment is Dispensed With.
- §85. When Delay in Making Presentment is Excused.
- §86. Waiver of Presentment.

§66. Necessity for Presentment of Check for Payment.—Presentment for payment is one of the steps which the holder of a check must take if he would charge the drawer and indorsers with liability thereon. If he fails or neglects to present the check for payment the drawer and indorsers will, in the absence of special circumstances, reference to which will be made in the

following sections, be released from liability.¹ In order to charge the drawer with liability on the check, it must be presented for payment within a reasonable time after its issue. But the failure to so present the check discharges the drawer only to the extent of the loss which he may have suffered by reason of the holder's neglect in this regard. Such a loss is suffered by the drawer where the drawee bank fails during the time the holder retains possession of the check.²

For the purpose of charging the indorser of a check presentment must be made within a reasonable time after its last negotiation. A failure to make due presentment discharges the indorser, irrespective of any actual loss he may have sustained as a result of the neglect.³

While it has been held that a memorandum check, that is, one bearing the word "memorandum" written across its face, or an abbreviation thereof, need not be presented for payment and is an engagement on the part of the drawer to pay absolutely without the formality of presentment or notice of dishonor,⁴ the effect of the word memorandum on a check is disputed and it has been held that a check so inscribed merely indicates an understanding that it is not to be presented immediately for payment.⁵

§67. By Whom Presentment May Be Made.—A check may be presented for payment by the holder, or by any person

1. Negotiable Instruments Law, §130 of the New York Act:

Culver v. Marks, 122 Ind. 554, 23 N. E. Rep. 1086; Cruger v. Armstrong, 3 Johns (N. Y.) 5; Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 24 S. E. Rep. 524; Hannon v. Allegheny Land Co., 44 Pa. Super. Ct. 266.

In an early case, Cruger v. Armstrong, 3 Johns (N. Y.) 5, it was said: "A check, although generally received as cash when given in payment, is, in form and in reality, a bill of exchange. It is therefore necessary to be presented for payment and is generally subject to the same rules. It is not a direct promise to pay by the drawer, as by the maker of a promissory note; but the drawer undertakes that the drawee shall accept and pay, and is answerable only in case of his failure. It is accordingly considered not as due from him until such demand be made, and the drawee refuses payment."

2. See *infra*, §77.

3. See *infra*, §78.

4. Franklin Bank v. Freeman, 16 Pick. (Mass.) 535; Cushing v. Gore, 15 Mass. 69; Turnbull v. Osborne, 12 Abb. Prac. N. S. (N. Y.) 200.

5. Dykers v. Leather Mfgs. Bank, 11 Paige, (N. Y.) 612.

authorized to receive payment in his behalf.⁶ Presentment may be made by the personal representative of the deceased owner of a check, or by an assignee in bankruptcy.

A check may be stamped payable through a certain bank, in which case the drawee bank is not required to pay it unless presented through the bank thus named. When a check is made payable in this manner and the holder presents it through some medium other than the designated bank, he may not lawfully cause the check to be protested upon the drawee's refusal to honor it. Protest under such circumstances will subject the protesting party to an action for damages.⁷ There may also be a binding stipulation on a check to the effect that it will not be paid if presented by a certain bank or individual.⁸

68. To Whom Presentment May Be Made.—Ordinarily a check should be presented for payment to the paying teller of the bank on which it is drawn, but it may, of course, be presented to any one authorized to act for the bank in this capacity. It has been held that the delivery of a check to the porter of the drawee bank, when he was making his round of other banks for exchange paper, was a good presentment, it appearing that it was the invariable practice of the porter to present checks thus received and return them the same day if dishonored.⁹ Where a notary took a check to a bank during banking hours for the purpose of demanding payment, and, finding the bank's doors closed, went to the president at another place, and demanded payment of him, there was held to be a sufficient presentment.¹⁰

6. Negotiable Instruments Law, §132 of the New York Act.

7. *Farmers' Bank of Nashville v. Johnson-King & Co.*, 134 Ga. 486, 68 S. E. Rep. 85.

8. In the case of *Commercial National Bank v. First National Bank*, 118 N. C. 783, 24 S. E. Rep. 524, there was a restriction stamped on the face of a check, which read: "This check will positively not be paid to the Gastonia Banking Company or its agents." It appeared that the placing of this condition upon the check was merely an effort on the part of the drawer of the check to prevent his transactions and the nature and extent of his business from becoming known to a rival in business. It was held that this restriction was valid and that the holder of the check could not maintain an action against the drawer thereon until the check had been presented for payment by some one other than the Gastonia Banking Company or its agents.

9. *Merchants' Bank v. Spicer*, 6 Wend. (N. Y.) 443.

10. *Niblack v. Park Nat. Bank*, 169 Ill. 517, 48 N. E. Rep. 438.

§69. Manner of Presentment.—In presenting a check for payment to the bank on which it is drawn, no particular form of expression is necessary to make a legal demand and refusal. It is sufficient if it clearly appears that the bank, after demand, declines to honor the check. If the holder of a check requests the drawee bank to credit it to his account, and the bank refuses, there is a sufficient presentment to charge the drawer. It is not necessary for the holder, after such a refusal, to go through the formality of demanding payment in cash.¹¹

On principle it would seem that there is not a sufficient presentment for payment, where the holder of a check requests the drawee bank to certify it, and that a refusal by the bank to certify would not justify the holder in protesting the check. The holder is entitled to present the check for payment only and is not entitled to certification as a matter of right. And it has been held that such a presentment is insufficient, in a case where a debtor sent a check to his creditor for the amount of a claim, which had been placed in an attorney's hands, and the creditor delivered the check to his attorney, who presented it at the bank for certification and immediately gave notice of dishonor to the drawer upon certification being refused.¹²

11. *Gregg v. George*, 16 Kan. 546.

In a case where a drawee bank paid a check bearing a forged indorsement, a subsequent verbal demand by the payee was held sufficient to charge the drawer, the possession of the check by the drawee obviating the necessity of a physical presentation of the check. *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 66 Pac. Rep. 326.

12. *Bradford v. Fox*, 16 Abb. Prac. (N. Y.) 51, 39 Barb. (N. Y.) 203.

In the opinion it was said: "Presenting a check to be certified is not demanding payment. The bank was under no obligation to certify the check or to accept it. The instrument did not require acceptance, but payment; and the duty of the holder was not discharged until he demanded payment. This he could not do in this case, because the check was payable to the order of the plaintiffs and was not indorsed by them. A request to the bank to do to the check something which they were under no obligation to the holder or drawer to do, can never be considered equivalent to a demand for payment, which, under the duty they owed to the drawer, they were bound to make, if he had funds in the bank. For a refusal to pay, under such circumstances, the drawer would have a right of action against the bank, but not for a refusal to certify." This case, however, was reversed upon appeal, and the plaintiffs allowed to recover. The action was not brought upon the check, but upon the original debt, and the court held that conceding that a request for certification was not a demand for payment or its equivalent nevertheless the circumstances

In such a case, if the bank refuses to certify the holder can charge the drawer and indorsers by subsequently presenting the check for payment within proper time. In one instance it appeared that the holder of a check presented it to the drawee, and upon being tendered the money, decided to leave it in the bank. The bank suspended later in the day. In an action against the drawer it was held that, if the holder presented the check for the purpose of ascertaining whether it was genuine, or was drawn against sufficient funds, or for the purpose of being identified as the person entitled to payment, not intending to present it for payment, he could charge the drawer by subsequently presenting the check for payment within proper time; but if he presented the check for payment, and upon payment being tendered, decided to leave the money in the bank for his own protection, and the bank failed before he again presented it, the drawer was discharged.¹³

In a case where the drawee refused to honor a check because it doubted the genuineness of the drawer's signature, the drawee making no request for time to investigate, the presentment was held sufficient to support a protest and to charge the drawer with liability, although the drawee later ascertained that the signature was genuine and would have paid the check if again presented. This was held on the theory that a drawee is bound to know its depositor's signature.¹⁴ And where the payee of

did not show that the check constituted a payment of the debt. *Bradford v. Fox*, 38 N. Y. 289.

13. *Simpson v. Pacific Mutual Life Ins. Co.*, 44 Cal. 139.

14. *Allen v. Kramer*, 2 Ill. App. 205. In this case it was said: "The law made it the duty of the drawees to know the signature of their depositors, the drawers. The holders were not bound, to furnish proof of its genuineness, nor were they bound, after once presenting the check for payment, to present it a second time after the drawees had taken time to verify the signature. A presentment of the check while the drawees were still solvent, a refusal of payment upon grounds for which the holders were in no way responsible, followed by protest and notice, fixed the liability of the drawers, and such liability is no way affected by the fact that the drawees subsequently became satisfied of the genuineness of the signature and would have paid the check had it been again presented before their failure. Had the holders of the check or their agents been notified of the willingness and readiness of the drawees to make payment, possibly a different rule might apply. It might then have been their duty, as an act of good faith to the drawers, to send a messenger a second time to the drawees and obtain the money."

a check, accepted in payment a draft drawn by the drawee on another bank, payment of which was refused because of the failure of the first bank, it was held that the payee could not charge the drawer by making a subsequent demand of the insolvent bank, although such demand was made within the time allowed for the presentment of a check.¹⁵

Where a number of checks are brought to the drawee bank at the same time, they should be presented separately, and not in a group, in order to authorize protest. In a case where seven checks were presented by a notary to the drawee bank at the same time, it was held that protest of one of them was not proper. The checks should have been presented separately in order to permit of the protest of any of them. In this case it appeared that the drawee had sufficient funds to pay the check which was thereafter protested, but did not have enough money to pay all of the checks.¹⁶

§70. Forwarding Check by Mail.—Negligence in forwarding a check cannot be predicated on the fact that the check was forwarded by mail, instead of by messenger, though the latter would have been more expeditious because of the fact that the distance was short and the railroad service poor and indirect.¹⁷

§71. Forwarding Check Directly to Drawee.—It is held that mailing a check directly to the drawee bank is not a proper method of presentment and not sufficient to charge the drawer of the check with liability in a case where the check is dishonored as a result of this manner of presentment.¹⁸ And, where a

15. *Anderson v. Gill*, 79 Md. 312, 29 Atl. Rep. 527, 25 L. R. A. 200. In this case the payee of a check deposited it to her credit in the Old Town Bank, indorsed for collection. This bank presented it to the drawee for payment on the following day shortly before 11 a.m., and instead of getting cash, received the drawee's check on the Western Nat. Bank. This check was presented for payment shortly before 3 p. m., but payment was refused because the drawee of the original check had failed at 1:30 p.m. the same day. It was held that under these circumstances, the drawer of the original check was not liable thereon.

16. *Peabody v. Citizens' State Bank*, 98 Minn. 302, 108 N. W. Rep. 272.

17. *Citizens' Bank of Pleasantville v. First Nat. Bank*, 135 Ia. 605, 113 N. W. Rep. 481.

18. *R. H. Herron Co. v. Mawby*, 5 Cal. App. 39, 89 Pac. Rep. 872; *Anderson v. Rodgers*, 53 Kan. 543, 36 Pac. Rep. 1067.

In *Farwell v. Curtis*, Fed. Cas. No. 4,690, 7 Biss. 160 decided in 1876,

check is dishonored as a direct result of such method of presentment, and it is not shown that there is a custom or usage to present in this manner, the check will operate as a payment of the debt for which it was given and the holder cannot recover the amount from the drawer.¹⁹

The mere fact of forwarding the check directly to the drawee, and its subsequent dishonor, will not of itself discharge the drawer or indorser; it is where it appears that the check would have been paid, if forwarded to an agent in due time and presented by him, that the act of mailing the check to the drawee discharges the drawer.²⁰ In other words, if it appears that no amount of diligence on the part of the holder would have resulted in the collection of the check, the laches, if any, of the holder in sending the check to the drawee, is no defense in an action against the drawer or indorser.²¹

it was said: "In these days when such facilities are presented by express companies for presentations at distant places, there is no reason for adopting a less direct or effective mode to accomplish the object."

19. *R. H. Herron & Co. v. Mawby*, 5 Cal. App. 39, 89 Pac. Rep. 872. In this case it was said: "Whilst a check drawn bona fide on a banker having funds of the drawer is *prima facie* payment, if accepted as cash, still, in the absence of any express agreement the acceptance of a check of either the debtor or a third party is in fact merely conditional payment—that is, satisfaction of the debt if and when paid; but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and, if the party from whom it is received sustains a loss by want of such diligence, it will be held to operate as actual payment."

As to a check operating as payment, generally, see, *supra* §8.

20. *Pelt v. Marljar*, 95 Ark. 111, 128 S. W. Rep. 554; *Citizens' Bank v. First Nat. Bank*, 135 Ia. 605, 113 N. W. Rep. 481.

In *Pelt v. Marljar*, 95 Ark. 111, 128 S. W. Rep. 554, the defendant drew a check payable to the plaintiff and delivered it to him on January 14th. On the 18th, the plaintiff indorsed the check in blank and delivered it to a bank for collection. This bank sent it to a correspondent bank which mailed it directly to the drawee on the 20th. The drawee, however, had closed its doors on that day because of insolvency, and payment was refused. It appeared that the drawee continued to pay checks presented in person or by agent up to the close of business on the 16th, and that if the payee had promptly forwarded the check to an agent for collection, it would have been paid. It was held that the drawer was discharged.

21. *Lowenstein v. Bresler*, 109 Ala. 326, 19 So. Rep. 860; *Citizens' Bank v. First Nat. Bank*, 135 Ia. 605, 113 N. W. Rep. 481.

In *Lowenstein v. Bresler*, 109 Ala. 326, 19 So. Rep. 860, an action was brought by the payee of a check against the drawer upon the debt in payment of which the check was given. It was held that the fact that the

§72. Time of Presentment of Check for Purpose of Charging Drawer.—In order to charge the drawer of a check with liability thereon it must be presented for payment within a reasonable time after its issue, and, in determining what is a reasonable time, regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments and the facts of the particular case. These requirements are found in the provisions of the Negotiable Instruments Law; the statute, in this particular, merely expresses the law as it existed before the adoption of the statute.²² The reason for requiring checks to be presented for payment within a reasonable time after their issue is that a check is not designed for circulation as a medium of exchange, and should, therefore, be presented with dispatch and diligence consistent with the attending circumstances.²³

It is generally held that, in order to be presented within a reasonable time, where the holder of the check and the drawee bank are in the same place, the check should be presented before the close of banking hours on the day after it is issued. If the check is not presented within such time and a loss results thereby, as where the drawee bank fails in the meantime, the drawer is discharged.²⁴

check was sent directly to the drawee for collection did not operate to extinguish the debt where it appeared that no degree of diligence would have resulted in collecting the check.

As to the liability of a bank, which receives a check for collection and forwards it directly to the drawee bank, see *infra*, §195-199.

22. Negotiable Instruments Law, §4 and §322 of the New York Act.

23. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 69 N. W. Rep. 765.

24. *Brown v. Schintz*, 98 Ill. App. 452; Affirmed, 202 Ill. 509, 67 N. E. Rep. 172; *Northwestern Iron & Metal Co. v. National Bank of Illinois*, 70 Ill. App. 245; *Willets v. Paine*, 43 Ill. 432; *Cox v. Citizens' State Bank*, 73 Kan. 789, 85 Pac. Rep. 762; *Veazie Bank v. Winn*, 40 Me. 60; *Gordon v. Levine*, 194 Mass. 418, 80 N. E. Rep. 505; *Hamilton v. Winona Salt & Lumber Co.*, 95 Mich. 436, 54 N. W. Rep. 903; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. Rep. 864; *Edmisten v. Herpolsheimer Co.*, 66 Neb. 94, 92 N. W. Rep. 138, 59 L. R. A. 934; *State Bank v. Carroll*, 81 Neb. 484, 116 N. W. Rep. 276; *Murphy v. Levy*, 23 Misc. Rep. (N. Y.) 147, 50 N. Y. Supp. 682; *Dehoust v. Lewis*, 128 N. Y. App. Div. 131, 112 N. Y. Supp. 559; *School District v. Eager*, 19 Okla. 235, 91 Pac. Rep. 847; *Turner v. Kimble*, Okl., 130 Pac. Rep. 563; *National State Bank v. Weil*, 141 Pa. St. 457, 21 Atl. Rep. 661; *Purcell v. Allemon*, 22 Grat. (Va.) 739; *Lewis*,

In a case illustrative of this principle a city treasurer received a check, drawn on a bank of which he was cashier, on December 30th. He neglected to present the check on the following day, and the bank failed to open on January 2nd, the 1st being a holiday, and went into the hands of a receiver. The treasurer knew of the failing condition of the bank. It was held that he was liable for his failure to turn the amount of the check over to his successor in office.²⁵ In another instance, the plaintiff, who lived in Chelsea, Michigan, while in Detroit, received a check drawn on a Detroit bank. The check was delivered on Saturday morning. The plaintiff took it home with him and deposited it in a Chelsea bank that evening. It was forwarded to a correspondent bank in Detroit, where it was received Monday at 1:30 p.m. Upon presentment to the drawee on Tuesday, payment was refused because of the drawee's failure.

Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. Rep. 1017, 4 L. R. A., N. S. 132.

Diligence in Presenting Check of Drawee, Taken in Payment of Check.—“The rule fixing the close of business hours of the next secular day as a reasonable time within which a check may be presented, so as to hold the drawer when drawn on a bank in the same place where it is delivered, has relation only to the contract and liability of the parties to the instrument, and does not apply to a check given by the drawee to the payee, or to the agent of the payee, of the original check, upon its surrender. There is no unbending or inflexible rule governing this latter condition of facts, and in the nature of things there could not well be. What would be due diligence under one condition of facts might be negligence under different circumstances; and all that can be definitely laid down is that every case must, in this particular, be decided upon its own peculiar facts, though in no instance can the liability of the drawer be extended beyond the period which would ordinarily limit it. The holder of a substituted check taken upon the surrender of the original check to the drawee thereof must use such diligence in presenting it for payment as a prudent man would under like circumstances use. This imposes no hardship upon the person who voluntarily accepts the drawee's check instead of cash. If he has had ample and abundant time to convert the drawee's check into money, and still omits to do so, he obviously has not used due diligence, and the results of such negligence should not be visited upon the original drawer who was in no way responsible therefor. Whether a delay to present the drawee's check till the close of business hours is due diligence cannot be asserted as an invariable rule. In some instances it might be, whilst in others it would manifestly not be.” *Anderson v. Gill*, 79 Md. 312, 29 Atl. Rep. 527, 25 L. R. A. 200. On this question see also, *infra*, §209, 225.

25. *Babcock v. City of Rocky Ford*, Colo., 137 Pac. Rep. 899.

It was held that, the drawer was discharged under such circumstances, unless he consented to the payee's act in taking the check to Chelsea.²⁶

Since a check is intended for payment, and not for circulation the time allowed for its presentment, as between the original parties, will not be enlarged by successive transfers,²⁷ nor does the deposit of a check in a bank give the holder an additional day in which to make presentment.²⁸

§73. Time of Presenting Check on Out-of-Town Bank.—

When the check in question is drawn on an out-of-town bank the holder is, of course, entitled to greater time in which to present for payment, than where he is in the same place with the drawee bank. Just how much time he is entitled to depends upon the circumstances. The distance which the check must be sent, the facilities for sending it and the customs and usages of banks in such cases may all be taken into consideration in ascertaining whether or not the check has been presented for payment within a reasonable time. In general it is required that the person receiving such a check, in the absence of special circumstances, forward it for presentment not later than the day after its receipt, and that the agent to whom it is thus forwarded present it for payment not later than the day after it is received by him.²⁹

It is not necessary in all cases that an out of town check be forwarded for presentment on the day following its receipt; thus, if the only or last mail on such day closes at an hour so early as to render it inconvenient for the holder to avail himself

26. *Holmes v. Roe*, 62 Mich. 199, 28 N. W. Rep. 864.

27. *Watt v. Gans*, 114 Ala. 264, 21 So. Rep. 1011; *Dehoust v. Lewis*, 128 N. Y. App. Div. 131, 112 N. Y. Supp. 559.

28. *Gregg v. Beane*, 69 Vt. 22, 37 Atl. Rep. 248.

29. *Little v. Phenix Bank*, 2 Hill (N. Y.) 425; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304, Aff'd., 13 Wend. 133; *Lewis-Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. Rep. 1017; *Northwestern Coal Co. v. Bowman*, 69 Ia. 150, 28 N. W. Rep. 496; *Tomlin v. Thornton*, 99 Ga. 585, 27 S. E. Rep. 147; *Lloyd v. Osborne*, 92 Wis. 93, 65 N. W. Rep. 859; *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. Rep. 1064; *First Nat. Bank v. Buckhannon Bank*, 80 Md. 475, 31 Atl. Rep. 302; *Woodruff v. Plant*, 41 Conn. 344; *Haggerty v. Baldwin*, 131 Mich. 187, 91 N. W. Rep. 150; *Carroll v. Sweet*, 9 Misc. Rep. (N. Y.) 382, 30 N. Y. Supp. 204; *Holmes v. Roe*, 62 Mich. 199, 28 N. W. Rep. 864.



of it, he is allowed an additional day.³⁰ And where a check is delivered by the drawer to a traveling agent of the payee, having no authority to indorse, at the place where the drawer is located, the latter impliedly agrees to the taking of such additional time as may be necessary for the transmission of the check to the principal.³¹

§74. Circuitous Routing of Checks Deposited for Collection.—

A bank which receives for collection a check drawn on an out-of-town bank, if it has no correspondent at the place where the drawee is located, should forward the check in such manner that it will be presented without unnecessary delay. It is improper to send the check over a circuitous route and the forwarding of a check in such manner will have the effect of discharging the drawer where the check is not paid upon presentment, if it appears that the check would have been paid if forwarded in a more direct manner.³²

30. *Lewis-Hubbard & Co. v. Montgomery Supply Co.*, 59 W. Va., 75, 52 S. E. Rep. 1017. In this case plaintiff had sold goods to defendant. On September 24th, a traveling salesman, employed by the plaintiff, received from the defendant a check for the amount due it some time earlier than 4 p.m. on that day. The check was payable to the order of the plaintiff and drawn on a bank in Montgomery, the town where the defendant was located. The drawee bank failed to open its doors on the 28th and went into the hands of a receiver, and the check not being presented until after that time, payment was refused. It was held that the failure to present the check did not bar a recovery from the drawer thereon, it appearing that the time intervening between the delivery of the check and the failure of the bank was not sufficient for presentment by the exercise of such diligence as the law requires.

31. *Lewis-Hubbard & Co., v. Montgomery Supply Co.* 59 W. Va. 75, 52 S. E. Rep. 1017; *Rosenthal v. Ehrlicher*, 154 Pa. St. 396, 26 Atl. Rep. 435

In *Rosenthal v. Ehrlicher*, 154 Pa. St. 396, 26 Atl. Rep. 435, the defendant drew a check in Philadelphia, where he resided on a bank in that city. The check was payable to the order of the plaintiff who lived in New York and was delivered to the agent of the plaintiff at the defendant's place of business in Philadelphia on May 5th, 1891. The agent returned to New York that day and delivered the check to his principal after the close of business hours. The plaintiff deposited the check in a bank for collection on May 6th and it was forwarded to Philadelphia on the 7th, where it was presented for payment about noon on the 8th, but the bank had already closed its doors and the check was not paid. It was held that plaintiff had used due diligence.

32. *Gregg v. Beane*, 69 Vt. 22, 37 Atl. Rep. 248. *Gifford v. Hardell*, 88 Wis. 528. As to liability of collecting bank, see, *infra*, §200.

What is required of the bank in such cases is that it act with reasonable diligence and promptitude, taking into consideration the nature of the instrument, the usages of the business world and the particular facts attending the transaction. It may forward the check through a series of correspondent banks, where such a course is in keeping with established custom and proper banking methods, and neither drawer nor indorser will be discharged though the demand might have been more promptly made by other means; but it may not cause the check to travel over an unreasonably circuitous route to its destination.³³

Such an indirect routing of a check is liable to result in a loss to the owner thereof. This is illustrated by a case which arose in Alabama. A check drawn on a bank located at Greenville, Ala., was received by the payee in Philadelphia on December 12th after banking hours, and deposited the next day in a local bank for collection. This bank, instead of sending the check directly to a person or bank at the place where the drawee bank was located, which would have made it possible to present the check on or before December 17th, sent the check to a bank in South Carolina, which forwarded it to another bank in Montgomery, Ala., by which it was sent to a person in Greenville, Ala., by whom it was presented to the drawee on December 19th, one day after the drawee had failed. There was no proof to show that the manner of collection adopted by the Philadelphia bank was based upon custom, or any previous dealings between the parties. In an action by the payee of the check against the drawer, to recover the price of the goods for which the check was given, judgment was given for the defendant, because of the undue delay in presentment.³⁴

§75. Presentment of Check Through Clearing House.—

It has been held that the presentment of a check through a clearing house does not add any time to the period within which

33. *Plover Savings Bank v. Moodie*, 135 Ia. 685, 110 N. W. Rep. 29.

34. *Watt v. Gans*, 114 Ala. 264, 21 So. Rep. 1011.

The Negotiable Instruments Law, specifying what shall constitute negotiation and providing that presentment of a bill of exchange payable on demand must be made within a reasonable time after its last negotiation, does not justify the sending of a check for collection in a round-about way through a number of banks. *First Nat. Bank v. Mackey*, 157 Ill. App. 408.

presentment is required.³⁵ It has even been held that the fact that there is a custom among banks to present checks through the clearing house and that the volume of their business makes such a custom necessary does not relieve the payee from the obligation of presenting his check not later than the day after he receives it, even in a case where the check was received after the close of banking hours.³⁶

35. *Rosenblatt v. Haberman*, 8 Mo. App. 486. The payee of a check received on the 9th, near the close of business hours, deposited it in his bank on the 10th and it was presented at the clearing-house on the 11th but the drawee had suspended on the 10th at the close of business. It was held that the drawer was discharged. The court said: "It is by the banks and for their convenience that clearing houses are used and the receiver of the check is not prevented from presenting it to the bank on which it is drawn. The effect of not so presenting the check but of depositing it with his own banker, and thus allowing the banker to hold it, according to the usual course of business, for another day before it is presented to the drawee, the holder of the check is presumed to know, and to be willing to take the consequences of."

Holmes v. Roe, 62 Mich. 199, 28 N. W. Rep. 864, where it was said: "The clearing house, and the method of conducting business through it have no bearing upon the liability of the drawer of a check which is alleged not to have been presented for payment within the time allowed by law."

See also, *infra* §224.

36. *Edmisten v. Herpolsheimer*, 66 Neb. 94, 92 N. W. Rep. 138. In this case the court expressed itself on the question of presentment through a clearing-house in the following terms: "The rule is that in the absence of special circumstances, in order to hold the drawer liable on his check, it must be presented not later than the day following its receipt, where the payee receives it in the same place in which the bank on which it is drawn is situated. Counsel concede this to be the rule, but urge that under the special circumstances in this case the plaintiffs were not required to present the check on the day following its receipt. The special circumstances relied on are that the collection of such paper in the city of Lincoln is made through the agency of a clearing-house, and that the check, having been received after banking hours, could not, in the usual course of business, pass through the clearing-house and be presented for payment on the the day following its receipt by them. This position is sustained by two opinions, both from the same court, and delivered by the same judge. *Loux v. Fox*, 33 Atl. (Pa.) 190; *Willis v. Finley*, 34 Atl. (Pa.) 213. In the opinions referred to a departure from the settled rules of the law merchant is impliedly admitted. An attempt to justify such departure is made on the grounds of a custom among banks, and the impossibility, owing to the great volume of business, of conforming to the established rule. The reasoning does not commend itself to our judgment. We do not believe a party should be permitted to excuse a lack of diligence by showing that such lack is customary among those engaged in like business in the same

It would seem, however, that the better rule in this regard is announced by the courts of New York and Pennsylvania, which hold that, where a check is delivered after banking hours, the holder is not bound to present it for payment on the following day, but may deposit it in his bank on such day, and a presentment by such bank through the clearing house on the second day after delivery is sufficient.³⁷

In the New York decision on this question, referring to the practice of presenting checks through the clearing house, the court said; "This usage of trade and business has become incorporated into the banking business of the state and country, and would be seriously affected if immediate presentment to the paying bank were required. Bearing in mind the general commercial law that the paying bank is required to satisfactorily identify the payee, * * * and bearing in mind also the vast number of checks daily used in the city of New York, it is apparent that, if the banks and trust companies of New York City were required, immediately upon their receipt, to present deposited checks to the banks upon which they are drawn for payment, confusion amounting almost to chaos would be the result."³⁸

city, nor to plead the magnitude of his business as an excuse for failure to prosecute it with diligence. The special circumstances that will excuse delay in presentment have generally been held to be such as are beyond the holder's control, or arise from some agreement or understanding between one or more of the other parties to the paper."

37. *Zaloom v. Ganim*, 129 N. Y. Supp. 85.

In *Loux v. Fox*, 171 Pa. St. 68, 33 Atl. Rep. 190, the courts said: "In every large commercial metropolis like Philadelphia, in which clearing houses are established, the customary mode of collecting checks drawn on banking institutions therein is by depositing them in bank for collection, etc. According to the ordinary course of business, checks thus deposited are presented for payment on the next ensuing business day. * * * If the customary hours of banking may be considered in passing on the question of due diligence—and there appears to be no reason why they should not—it is evident that nothing could have been done with the check on the day it was received. * * * Considering the hour of the day when the check was delivered to defendant it is practically the same as if, in express terms, it had been made payable on the following day. There is therefore no good reason why it should not be treated as received on the 7th instead of the 6th of May."

38. *Zaloon v. Ganim*, 72 Misc. Rep. (N. Y.) 36, 129 N. Y. Supp. 85. In this case a check delivered on August 4th, after banking hours, was deposited by the payee in his bank on the 5th, and presented at the clearing house on the 6th, when payment was refused because of the suspension

In a Pennsylvania case it appeared that the payee of a check, received after banking hours, deposited it the same day in a savings bank, the only bank in the city open at that time. On the next day the savings bank sent it to the bank through which it cleared, but this bank, having made up its clearing house list for that day, did not present it until the day following. It was held that due diligence had been used in presenting the check.³⁹

§76. Presentment where Payee has Reason to Believe that Drawee is in Bad Financial Condition.—The fact that the payee of a check has reason to believe that the bank on which it is drawn is in failing condition is not a sufficient reason to require presentment before the next day after delivery. The drawer of a check issues it with the implied understanding that it may be presented at any time before the close of banking hours on the day following delivery, and the holder takes it with the same understanding. During this time, therefore, no laches can be imputed to the holder unless he received the check upon a different agreement.⁴⁰ This is not, however, the invariable rule, for it has been held that, if the holder of a check has notice of the fact that the drawee bank is in a precarious financial condition, he should present it at his first opportunity, and is not entitled to the time ordinarily allowed for presentment.⁴¹

§77. Drawer Discharged By Failure to Present only where Loss Occurs.—The failure to present a check for payment within

of the drawee. If the check had been presented on the 5th it would have been paid. It was held that the check was presented within a reasonable time and that the drawer was not discharged.

39. *Willis v. Finley*, 173 Pa. St. 28, 34 Atl. Rep. 213.

40. *Northwestern Iron & Metal Co. v. National Bank of Illinois*, 70 Ill. App. 245.

There is no obligation to present a check at a time outside of the usual banking hours, even though the agent, to whom the check is entrusted, has notice that the drawee bank is in failing condition. *Temple v. Carroll*, 75 Neb. 61, 105 N. W. Rep. 989.

In *Schoolfield v. Moon*, 56 Tenn. 171 it was said: "The drawer issues it with the implied undertaking that it need not be presented for payment except within the business hours of the next day after its issuance and the holder takes it with the same understanding. During this time, therefore, no laches can be imputed to the holder, unless he received it with a different contract."

41. *First Nat. Bank v. Alexander*, 84 N. C. 30.

a reasonable time after its issue operates to discharge the drawer only where he has suffered a loss as a result of the failure and then only to the extent of such loss.⁴² In this respect checks differ from other bills of exchange; in the case of the ordinary bill of exchange the drawer is discharged by a failure to make proper presentment, without regard to any loss he may have suffered as a result of such neglect. But it must appear that the drawer of a check has suffered a loss as a result of the failure to make due presentment, before he can take advantage of the default.⁴³

42. Negotiable Instruments Laws, Section 322 of the New York Act. *Williams v. Braun*, Cal., 112 Pac. Rep. 465; *Mize v. Godsey*, 16 Ky. L. Rep. 399; *Daniels v. Kyle*, 5 Ga. 245; *Cowing v. Altman*, 79 N. Y. 167; *Kramer v. Grant*, 60 Misc. Rep. (N. Y.) 109, 111 N. Y. Supp. 709; *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, 27 S. E. Rep. 979, 38 L. R. A. 749; *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430, Aff'd., 94 Fed. Rep. 925; *Thom v. Sinsheimer*, 66 Ill. App. 555; *Herider v. Phoenix Loan Ass'n.*, 82 Mo. App. 427; *Greeley v. Cascade County*, 22 Mont. 580, 57 Pac. Rep. 274; *Andrus v. Bradley*, 102 Fed. Rep. 54; *Long Bros. v. Eckert*, 73 Mo. App. 445; *Brown v. Schintz*, 98 Ill. App. 452, Aff'd., 202 Ill. 509, 67 N. E. Rep. 172; *Gregg v. George*, 16 Kan. 546; *Furber v. Dane*, 203 Mass. 108, 89 N. E. Rep. 227.

43. *Griffin v. Kemp*, 46 Ind. 172, where the court said: "There is an important difference with reference to the consequences of a failure of the holder of a bill and of a check to present the same for payment, and to give notice of their dishonor. If demand of payment of a bill be not made, or if notice of non-payment thereof be not given, as required by the rules of the commercial law, the drawer is discharged, whether any damages resulted to him from such failure, or not. The law presumes that he was damaged, and no evidence is admissible on the subject. If the payee or other holder of a check receives it immediately from the drawer, in the same town or city where it is payable, he is bound to present it for payment to the bank or bankers, at furthest, on the next succeeding secular day after it is received, before the close of the usual banking hours. He may, however, although he is not bound so to do, present it for payment on the same day on which it is drawn or delivered to him; but he is allowed to wait until the next succeeding day. Where he receives the check from the drawer in a place distant from the place of payment, it will be sufficient for him to forward it by post to some person in the latter place on the next secular day after it is received; and the person to whom it is thus forwarded will not be bound to present it for payment until the day after it has reached him by the course of the post. If payment is not thus regularly demanded, and the bank or banker should fail before the check is presented, the loss will be then the loss of the holder, who will have made the check his own, and at his sole risk by his laches. But if the bank or banker continues solvent, and no damage arises from the delay in the present-

Practically the only risk assumed by the holder in delaying presentment, so far as his rights against the drawer are concerned, is the insolvency of the drawee.⁴⁴ If the payee of a check neglects to present it within the time allowed him by law for such presentment, and payment is refused because the drawer has stopped payment, or, because he has insufficient funds on deposit to pay the check, then the drawer has suffered no loss as a result of the delayed presentment and he will be held liable to the payee in an action on the check. But, if the payee neglects to make presentment within a proper time, and he finds it impossible to collect the check when he does present it, because of the failure of the drawee, then the drawer has actually suffered a loss as a result of the payee's negligence, providing it appears that the drawee had sufficient funds on deposit at the time of the failure to pay the check, and that the check would have been paid if presented in proper time. And in such a case, the drawer is released from liability on the check. Under such circumstances, the check is deemed to operate as payment and the drawer is also released from liability to the payee upon the indebtedness, in payment of which the check was given.⁴⁵ The drawer is not discharged, even by a delay of two years in presenting his check where it appears that he suffered no loss as a result of the delay.⁴⁶ Where presentment of a check is delayed until after the failure of the drawee bank, but the drawer has settled with the bank in such manner as to suffer no loss by reason of the failure, he will not be discharged as drawer.⁴⁷ In an action on a check, unpaid because of the payee's neglect to present it within a reasonable time and until after the drawee's failure, the burden is on the plaintiff to show that the drawer suffered no loss as a result of the delay.⁴⁸

ment, the drawer continues liable, a check differing in this respect from a bill of exchange. If the drawer has no funds in the bank or with the banker on which or whom the check is drawn, no demand is necessary."

44. *Moskowitz v. Deutsch*, 46 Misc. Rep. (N. Y.) 603, 92 N. Y. Supp. 721; *Springfield Marine & Fire Ins. Co. v. Tincher*, 30 Ill. 399.

45. As to when a check operates as payment, see, *supra*, §8.

46. *Nelson v. Kastle*, 105 Mo. App. 187, 79 S. W. Rep. 730.

47. *Williams v. Brown*, 82 N. Y. App. Div. 353, 80 N. Y. Supp. 247.

48. *Watt v. Gans*, 114 Ala. 264, 21 So. Rep. 1011; *Nelson v. Kastle*, 105 Mo. App. 187, 79 S. W. Rep. 730; *Dehoust v. Lewis*, 128 N. Y. App. Div. 131, 112 N. Y. Supp. 559.

§78. Discharge of Indorser of Check.—The discharge of check indorsers is governed by a different rule than the one which applies to drawers. The drawer is discharged by a failure to present the check within a reasonable time after its issue, to the extent of the loss caused by the delay. The indorser of a check is discharged absolutely by the failure to present the check within a reasonable time after its last negotiation.⁴⁹ If the check is not presented promptly after its last negotiation the indorsers will be discharged from liability, irrespective of whether they have suffered any loss by the delay, and even though presentment in due course would have been unavailing.⁵⁰

49. The Negotiable Instruments Law, Section 131 of the New York Act, provides as follows: "Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

The California Code (sec. 3255) places drawers and indorsers of checks upon the same footing with respect to the effect of delay in presentment for payment. The section referred to provides: "The drawer and indorsers are exonerated by delay in presentment only to the extent of the injury which they suffer thereby."

50. *Ford v. McClung*, 5 W. Va. 156; *First Nat. Bank v. Miller*, 37 Neb. 500, 65 N. W. Rep. 1064; *Gough v. Staats*, 13 Wend (N. Y.) 549; *First Nat. Bank v. Mackey*, 157 Ill. App. 408; *Start v. Tupper*, 81 Vt. 19, 69 Atl. Rep. 151; *Schoolfield v. Moon*, 56 Tenn. 171.

In *Start v. Tupper*, 81 Vt. 19, 69 Atl. Rep. 151, the holder of a check retained it for six days after receiving it from a drawer and payment was refused because of insufficient funds. The court in deciding that the holder could not recover from the indorser said: "The agreed statement shows a failure to forward in due course and this is decisive of the case presented. The considerations on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer are not applicable to an indorser. The drawer is presumed to know the insufficiency of the fund while the indorser is entitled to rely on its sufficiency. The drawer is the one primarily liable and prompt presentment and notice of non-payment may enable the indorser to secure himself. The indorser's liability is impliedly conditioned on this being done and a failure therein will discharge him even though presentment in due course would have been unavailing. In default of presentment and notice an indorser can be charged only by affirmative proof that he knew when he passed the check that there were or would be no funds in bank to meet it."

In *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. Rep. 451 a Wisconsin bank sold its draft on a Chicago bank. The purchaser in-

Some of the decisions do not seem to recognize this distinction which the law makes between the discharge of a drawer and the discharge of an indorser because of delay in presentment for payment, but it is brought out clearly in the provisions of the Negotiable Instruments Law.⁵¹

In a case where the drawer of a check is discharged by a failure to make presentment within a reasonable time after the issue of the check, the indorsers are also discharged under the Negotiable Instruments Law, which provides that "a person secondarily liable is discharged * * * by the discharge of a prior party."⁵²

§79. Presentment of Banker's Check.—A distinction in regard to presentment for payment is made between checks issued by banks for profit and checks issued by persons or corporations other than banks without reference to profit, but merely for their own convenience in making settlements. In the former case the bank is understood to sanction the circulation of the check and has no right to expect its immediate presentment. As to the drawer of a draft of this kind such presentment only is required as is required in the case of an ordinary bill of exchange payable on demand, under like circumstances, that is, it must be presented within a reasonable time after its last negotiation.⁵³

dorsed it to a party in Washington, who carried it around with him and negotiated to a bank in San Francisco more than a month after its issue. The draft was promptly forwarded by the last mentioned bank and presented for payment, but was dishonored, the drawee going into the hands of a receiver shortly thereafter. It was held that, since the draft was promptly presented after its last negotiation the indorser was not discharged the time between the issue of the draft and its last negotiation not entering into the computation at all.

Indorser released where check is not presented within a reasonable time and it appears that it would have been paid if presented in due course. *Hough v. Gearen*, 110 Ia. 240, 81 N. W. Rep. 463; *Parker v. Reddick*, 65 Miss. 242, 3 So. Rep. 575; *Moody v. Mack*, 43 Mo. 210; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. Rep. 717; *First Nat. Bank v. Miller*, 37 Neb. 500; *Gifford v. Hardell*, 88 Wis. 538, 60 N. W. Rep. 1064.

51. §131 and 322 of the New York Act.

52. §201 of the New York Act.

53. *Marbourg v. Brinkman*, 23 Mo. App. 511; See also *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. Rep. 451.

In *Marbourg v. Brinkman*, 23 Mo. App. 511, a firm of bankers, which had sold exchange on a Kansas City Bank was held liable to the payee in an action upon the dishonored draft, notwithstanding that presentment

§80. Presentment of Certified Checks.—The rule requiring the presentment of a check within a reasonable time after its issue, in order to charge the drawer, applies to a check, which has been certified at the instance of the drawer before its delivery to the payee, as well as to an uncertified check.⁵⁴ And, as in the case of an uncertified check, the drawer is discharged by a neglect on the part of the holder to make due presentment, only to the extent of any loss that the drawer may suffer as a result of such neglect.⁵⁵ But, as regards the drawee bank, which has certified a check, demand may be made at any time within the statute of limitations.⁵⁶ Of course, where the check is certified at the instance of the holder, the drawer and indorsers are thereby discharged and the question of presentment for the purpose of holding them liable does not arise.⁵⁷

§81. Time of Day when Presentment may be Made.—It is provided in the Negotiable Instruments Law,⁵⁸ that presentment for payment must be made "at a reasonable hour on a business day." As applied to bank checks this section pre-

had not been made within the reasonable time required of the holders of checks drawn by private individuals. Referring to the distinction in this regard, between checks drawn by banks and checks drawn by individuals, the court said: "The principle upon which this distinction is based would seem to apply with full force to a draft drawn by a bank upon another and distant bank, intended by the course of business to be circulated and not to be presented at once for payment. * * * It is a part of the business and commercial history of the country that the various banks sell, for what is known as exchange, drafts upon their correspondent banks at distant business centers, which are intended to circulate as bills of exchange payable on demand circulate. That this is the fact, and that such is the usual business course of banks in the locality of the defendants' bank with relation to their correspondents at Kansas City was abundantly shown by the evidence. We hold that as to the drawers of the draft, such presentment for payment only was required of the payee and the subsequent holders, as is required in the case of a bill of exchange, payable on demand, under like circumstances."

54. *Bickford v. First Nat. Bank*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; *Northwestern Iron & Metal Co. v. National Bank of Illinois*, 70 Ill. App. 245; *Andrews v. German Nat. Bank*, 56 Tenn. 211.

55. *Thompson v. British North American Bank*, 13 Jones & S. (N.Y.) 1.

56. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125.

57. See, *infra*, §232.

58. Section 132 of the New York Act.

sumably sanctions presentment during regular banking hours. It has been held under the section of the Negotiable Instruments Law in question that, where a presentment was made to a bank in Chicago between three and six o'clock, and it was shown that the business hours of banks there continued after the closing of clearing house transactions so as to enable banks holding paper for collection to present such as had been refused recognition in the clearings, the presentment was made at a reasonable hour.⁵⁹

§82. Time of Presentment of Postdated Check.—A post-dated check is not properly presentable for payment until the day of its date arrives. Such a check is not to be considered as if dated the day on which it is drawn and made payable on a future day. It is to be treated as if it were without existence prior to the day of its date. A postdated check is not capable of valid presentment, acceptance or payment, prior to the time of its date. If it is presented in advance of its date, the drawee bank, though it has funds of the drawer sufficient therefor, cannot pay it or set aside the amount necessary for that purpose, as against other checks made payable and presented prior to the date of the postdated check.⁶⁰ Where a drawee bank put aside funds to meet a postdated check, which was presented prior to its date, and then protested subsequent checks of the same drawer, which protest would not have been necessary except for the setting aside of funds against the postdated check, it was held that the bank was liable to the drawer in damages.⁶¹

A postdated check falling due on Sunday, should be presented on the next business day; a presentment on the day preceding in such case is a nullity and is not sufficient to charge an indorser.⁶²

§83. When Presentment Not Required to Charge Drawer.—Presentment of a check for payment is not required in order to charge the drawer where he has no right to expect or require

59. *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N.W. Rep. 451.

60. *Smith v. Maddox-Rucker Banking Co.*, 8 Ga. App. 288, 68 S. E. Rep. 1092; *Mohawk Bank v. Broderick*, 13 Wend. (N. Y.) 133; *Frazier v. Trow*, 24 Hun. (N. Y.) 281; *Salter v. Burt*, 20 Wend. (N. Y.) 205.

61. *Smith v. Maddox-Rucker Banking Co.*, 8 Ga. App. 288, 68 S. E. Rep. 1092.

62. *Salter v. Burt*, 20 Wend. (N. Y.) 205.

that the drawee will pay it.⁶³ This rule finds its chief application in the case where a check is knowingly drawn against insufficient funds. Where a man draws his check on a bank, knowing that there are no funds on deposit to his credit, or that the amount on deposit is smaller than the amount of the check, and having no reason to believe that the bank will honor the check, he is not damaged by a failure to present the check, and he is liable as drawer though no presentment is made.⁶⁴ And where a drawer, having sufficient funds on deposit at the time of delivering his check, withdraws the funds before the time when the check should be presented in due course, no presentment is required in order to charge him as drawer.⁶⁵ The reason for the rule is that it is a fraud for one to give a check which he has no ground to believe will be paid, and that he needs no notice of the fact that it is not paid, when he must have known that payment would be refused.⁶⁶

The fact alone that the drawer has insufficient funds in the hands of the drawee is not enough to excuse presentment; if it appears that the drawer had a reasonable expectation that his check would be paid, then a failure to make due presentment will discharge him, where he has suffered a loss as a re-

63. Negotiable Instruments Law, §139 of the New York Act.

64. *First Nat. Bank v. Linn County Nat. Bank*, 30 Ore. 296, 47 Pac. Rep. 614; *Thom v. Sinsheimer*, 66 Ill. App. 555; *Case v. Morris*, 31 Pa. 100; *Carson, Pirie, Scott & Co. v. Fincher*, 138 Mich. 666, 101 N. W. Rep. 844, *Lester-Whitney Shoe Co. v. Oliver*, 1 Ga. App. 244, 58 S. E. Rep. 212; *Beauregard v. Knowlton*, 156 Mass. 395; *Kimball & Mitchell v. Bryan*, 56 Ia. 632; *Fletcher v. Pierson*, 69 Ind. 281.

In *Beauregard v. Knowlton*, 156 Mass. 395, the court said: "We assume that under ordinary circumstances the drawer of a check is not liable to a suit upon it without presentment to the bank and dishonor. But the cases hold that a check is in the nature of a bill of exchange, payable on demand, and that many of the same rules apply to both. The drawer of a bill of exchange is liable without presentment, if he has no effects in the hands of the drawee, unless the drawee has something equivalent to effects, or has agreed to accept and pay, or the drawer has some ground for a reasonable expectation that the bill be accepted and paid. The same general principles are applied to checks, and presentment is excused where the making of the check was a fraud upon the part of the drawer, he having no funds in the bank, and no ground for a reasonable expectation that it would be paid."

65. *Armstrong v. Brolaski*, 46 Fed. Rep. 903; *Emery v. Hobson*, 63 Me. 32.

66. *Hamlin v. Simpson*, 105 Ia. 125, 74 N.W. Rep. 906, 44 L. R. A. 397.

sult.⁶⁷ The test applied is that of good faith on the part of the drawer; if, because of some understanding with the bank, or for some other reason, he was justified in believing that his check would be honored by the drawee, notwithstanding the insufficiency of his account, then he is entitled to have his check promptly presented and to receive due notice of its nonpayment.

No presentment of a check is necessary where the drawer has stopped payment on it, for the obvious reason that the drawer knows it will not be paid if presented.⁶⁸

§84. When Presentment is Dispensed With.—Presentment is dispensed with, both as to drawers and indorsers where, after the exercise of reasonable diligence, presentment cannot be made.⁶⁹ Presentment is not required where an injunction has been served on the drawee bank, suspending it from operation,⁷⁰ nor where the drawee becomes insolvent before the time for presentment elapses.⁷¹ And a failure to present is excused by the accidental destruction of the check by fire.⁷² and by its loss in transit through the mails.⁷³ But the fact that the holder of a check is physically disabled, so that he cannot present the check in person, will not excuse his failure to present where it appears that the presentment might have been accomplished by other means.⁷⁴

§85. When Delay in Making Presentment is Excused.—Delay in making presentment for payment is excused, both as

67. *Hamlin v. Simpson*, 105 Ia. 125, 74 N. W. Rep. 906, 44 L. R. A. 397; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U.S. 696, 28 L. Ed. 866.

But see *Culver v. Marks*, 122 Ind. 554, 23 N. E. Rep. 1086, where it was held that a drawer, who drew checks against no funds, could not introduce evidence to show that the drawee bank would have paid the checks, had they been presented.

68. *Hopkirk v. Page*, Fed. Cas. No. 6,697, *Neederer v. Barber*, Fed. Cas. No. 10,079; *Woodin v. Frazee*, 38 N. Y. Sup. Ct. 190; *Bradley Fertilizer Co. v. Lathrop*, 2 City Ct. Rep. (N. Y.) 289; *Jacks v. Darrin*, 3 E. D. Smith, 557.

69. *Negotiable Instruments Law*, §142 of the New York Act.

70. *Lovett v. Cornwell*, 6 Wend. (N. Y.) 369.

71. *Syracuse, B. & N. Y. R. Co. v. Collins*, 57 N. Y. 641; See also *Planters' Bank v. Merritt*, 54 Tenn. 177; *Jackson Ins. Co. v. Sturges*, 59 Tenn. 339.

72. *Scott v. Meeker*, 20 Hun. (N. Y.) 161.

73. *First Nat. Bank v. McConnell*, 103 Minn. 340, 114 N. W. Rep. 1129.

74. *Purcell v. Allemon*, 22 Gratt. (Va.) 739.

to drawers and indorsers, when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. But when the cause of delay ceases to operate, presentment must be made with reasonable diligence.⁷⁵ That is, if the holder of a check is prevented by a state of circumstances beyond his control from promptly presenting the check, his delay in presenting will be excused so long as the conditions responsible therefor continue to exist.⁷⁶ Thus, a delay in presentment is excused where the delay is due to an error on the part of a postal clerk in sending a check to the wrong place.⁷⁷ But where a bank mails a check directly to the drawee, which is never received by the drawee, and neglects to obtain and present a duplicate for more than a month, the delay is unreasonable and discharges an indorser.⁷⁸ And a verbal agreement between the drawer and payee of a check that it is not to be presented until a certain subsequent day is a sufficient excuse for delay.⁷⁹

A delay of three days in presenting a check is not excused by the fact that the holder mistakenly thought it was drawn for an insufficient amount and held the check for the purpose of finding the drawer and having the error corrected.⁸⁰ And it has been held that delay in presenting a check is not excused by the fact that a violent storm rendered it difficult to travel the required distance.⁸¹ A delay, for which there is no sufficient excuse, absolutely discharges the indorsers, but the drawer is not discharged in any case unless it appears that he has suffered a loss as a result of the delay.⁸²

§86. Waiver of Presentment.—Presentment of a check may be waived by the drawer or indorser, either orally or in writing, and either in express terms or impliedly by acts clearly cal-

75. Negotiable Instruments Law, §141 of the New York Act.

76. *Moody v. Mack*, 43 Mo. 210; *Norris v. Despard*, 38 Md. 487.

77. *Windham Bank v. Norton*, 22 Conn. 213; *Simonds v. Black River Ins. Co.*, Fed. Cas. No. 12,874.

78. *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. Rep. 329.

79. *Pollard v. Bowen*, 57 Ind. 232.

80. *Hannon v. Alleghany Bellevue Land Co.*, 44 Pa. Super. Ct. 266.

81. *McDonald v. Mosher*, 23 Ill. 206.

82. *Cogswell v. Rockingham Ten Cents Savings Bank*, 59 N. H. 43; *Morrison v. McCartney*, 30 Mo. 183.

As to discharge of drawer, see, *supra*, §77.

culated to induce the holder not to make presentment. Presentment may be waived after the time for presentment has passed, as well as before. But where the waiver is made after the time for presenting has passed, the party giving the waiver must act with full knowledge of the facts releasing him from liability.⁸³ If he has knowledge of such facts at the time of the waiver it is immaterial that he did not understand their legal import and did not know that they operated to release him.⁸⁴ A waiver of protest waives presentment and notice of dishonor, as well as formal protest, but a waiver of notice of protest, waives notice only and does not dispense with demand.⁸⁵

83. *Compton v. Gilman*, 19 W. Va. 312; *Kelley v. Brown*, 71 Mass. 108; *Murphy v. Levy*, 23 Misc. Rep. 147, 50 N. Y. Supp. 682; *State Bank of St. Johns v. McCabe*, 135 Mich. 479.

84. *Toole v. Crafts*, 193 Mass. 110.

85. Negotiable Instruments Law, §182 of the New York Act.

CHAPTER VIII.

NOTICE OF DISHONOR.

- §87. Necessity for Notice of Dishonor.
- §88. Obligation to use Due Diligence in Giving Notice of Dishonor.
- §89. Waiver of Notice of Dishonor.
- §90. Where Drawer is Not Entitled to Notice.
- §91. Discharge of Drawer or Indorser by Delay in giving Notice.
- §92. Where Notice may be Given to Agent.
- §93. To Whom Notice Should Be Given After Death of Party.
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- §96. Notice to Bankrupt or Insolvent.
- §97. By Whom Notice May Be Given.
- §98. Notice May Be Given by Agent of Party.
- §99. Notice Given by One Party Inures to the Benefit of Others.
- §100. Form of Notice in General.
- §101. Notice Need Not Be Signed.
- §102. Verbal Notice of Dishonor.
- §103. Notice of Dishonor by Telephone.
- §104. Effect of Failure to State that Instrument Has Been Presented.
- §105. Effect of Failure to State that Drawer or Indorser is looked to for Payment.
- §106. Error in Notice as to Name of Party.
- §107. Effect of Mistake as to Amount of Instrument.
- §108. Where Date Erroneously Stated or Omitted.
- §109. Incorrect Address on Notice.
- §110. Notice May Be Given by Delivering it Personally or by Sending it through the Mails.
- §111. Time of Giving Notice.
- §112. Place to Which Notice of Dishonor May Be Sent.

§87. Necessity for Notice of Dishonor.—When a check has been presented for payment, and payment has been refused by the bank, notice of dishonor must be given to the drawer¹ and each indorser,² in order to charge them with liability on the check, unless the notice has been waived, or otherwise dispensed with.

§88. Obligation to Use Due Diligence in Giving Notice of Dishonor.—The giving of notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given, or does not reach the party sought to be charged.³

When the time for giving notice arrives, the party to give notice may not know where to send the notice in order that it may reach the party sought to be charged. Naturally he will take certain steps to obtain the required information and will direct the notice in accordance with the information which he obtains. If he is unable to get any information, or if the notice does not reach the party, it does not necessarily follow that the indorser is discharged of liability. It all depends on whether the party sending the notice has used due diligence in locating the drawer or indorser, and in sending the notice. If he did exercise due diligence then the party is liable notwithstanding the failure of the holder to find him, or the failure of

1. *Cassel v. Regier*, 114 N. Y. Supp., 601; *Kuflick v. Glasser*, 114 N. Y. Supp. 870; *Ewald v. Faulhaber Stable Co.*, 105 N. Y. Supp. 114.

2. *Neg. Inst. L.*, Sec., 160 of the New York act.

Under the Negotiable Instruments Law, §186 of the New York act, it is provided that:

"Notice of dishonor need not be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation."

It will be seen that this section can have but a very limited application to bank checks.

An accommodation indorser is discharged unless he is given notice of dishonor. *Braley v. Buchanan*, 21 *Kans.* 274.

3. *Neg. Inst. L.*, §183 of the New York Act.

Palmer v. Whitney, 21 *Ind.* 58; *Vogel v. Starr*, 132 *Mo. App.* 430, 112 *S. W. Rep.* 27; *Gawtry v. Doane*, 51 *N. Y.* 84.

the notice to reach him. If such diligence was not used, then the drawer or indorser is discharged.⁴ It is impossible to accurately define reasonable diligence. Whether sufficient diligence has been used is a question which must be determined in each case as it arises, with reference to the particular facts presented.

While looking in a city directory for the address of a drawer or indorser is, in conjunction with other circumstances, some evidence of due diligence, the mere inspection of a directory, without further inquiry, is not sufficient. Such books are said to be accurate enough in a general way, but they are private ventures depending upon information gathered by unknown agents, and the possibility of error in using them is too great to permit of their being considered "the best information obtained by diligent inquiry."⁵

In a case where delay in giving notice is excused by reason of circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence, the notice must be given with reasonable diligence when the cause of delay ceases to operate.⁶

§89. Waiver of Notice of Dishonor.—A drawer or indorser may waive notice of dishonor before the time for giving notice has arrived, either by express stipulation, or by acts from which such a waiver may be implied. Notice may also be waived, expressly or impliedly, after the time for giving notice has passed. But in the latter case, in order for a waiver to be implied from the acts of the party, it must appear that he had full knowledge of the facts which released him from liability.⁷ In an action by the holder of a check against the bank, in which he deposited the check, to recover damages on account of the bank's failure to give him notice of the dishonor of the check,

4. *Haly v. Brown*, 5 Pa. 178; *Smith v. Fisher*, 24 Pa. 222; *Hazlett v. Bragdon*, 7 Pa. Super Ct. 581.

5. *Cuming v. Roderick*, 28 N. Y. App. Div. 253, 50 N. Y. Supp. 1053; *Bacon v. Hanna*, 137 N. Y. 379, 33 N. E. Rep. 303; *Lawrence v. Miller*, 16 N. Y. 235; *Greenwich Bank v. DeGroot*, 7 Hun (N. Y.) 210.

6. *Neg. Inst. L.*, §184 of the New York Act; *Martin v. Ingersoll*, 8 Pick. (Mass.) 1.

7. *Gawtry v. Doane*, 48 Barb. (N. Y.) 148.

it was held that the holder's act in giving his check to the bank and receiving the dishonored check in return, waived the notice.⁸

In a case, arising in Wisconsin, it appeared that the plaintiff had indorsed a check, payable to him, and deposited it in the defendant bank on September 21st. On October 1st the bank learned that the check, which had been forwarded for collection on the day of its receipt, had not reached its destination, but it did not notify the plaintiff of the non-payment until October 19th. The plaintiff then obtained a duplicate check and sent it through, but payment was refused for want of funds. It was held that the plaintiff's act in obtaining the duplicate check did not operate to waive notice of dishonor, for the reason that it did not appear that he had knowledge of the facts involved.⁹

A waiver of protest operates to waive presentment and notice of dishonor,¹⁰ but a waiver of notice of protest waives notice only and is not construed as a waiver of presentment.¹¹

§90. Where Drawer is not Entitled to Notice.—There are circumstances, in which notice of dishonor is not required to charge a drawer with liability.¹² It is frequently held that the drawer is not entitled to notice of dishonor where he has no right to expect that his check will be honored by the bank on which it is drawn. A check is presumed to be drawn against sufficient funds, and the drawer is presumed to know the status of his account. Consequently, if he draws a check knowing that he has no funds in the drawee bank, and there

8. *Weil v. Corn Exchange Bank*, 63 Misc. Rep. (N. Y.) 300, 116 N. Y. Supp. 665; Aff'd., 135 N. Y. App. Div. 915, 119 N. Y. Supp. 1149.

9. *Aebi v. Bank of Evansville*, 124 Wis. 73.

10. *Atkinson v. Skidmore*, Ky., 153 S. W. Rep. 456.

11. *Neg. Inst. L.*, §182 of the New York act.

12. The Negotiable Instruments Law, §185 of the New York act, provides as follows:

"Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. Where the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment."

is no valid agreement with the bank that it will honor checks thus drawn, he has no right to expect anything other than a dishonor of his check, and he will not be permitted to defend an action against him on the check on the ground that he received no notice of dishonor.¹³ Thus, the drawer of a check is not entitled to notice of dishonor, where he knew at the time of drawing the check that the drawee bank was insolvent and that his account was overdrawn,¹⁴ or where he had no funds in the bank except depreciated funds, which the payee refused to accept,¹⁵ or where he had funds in the bank at the time of drawing the check, but subsequently withdrew the funds on other checks.¹⁶

The mere fact that the drawer has no funds in the hands of the drawee will not of itself excuse the giving of notice. The drawer's right to notice in such case depends largely upon his good faith in drawing the check. If the drawer had reasonable ground to believe that the check would be paid, then he is entitled to notice notwithstanding that the check was drawn against insufficient funds.¹⁷ Notice of dishonor need not be given to the drawer of a check where the drawer is the person to whom the check is presented for payment,¹⁸ and notice is not necessary to charge the drawer of a check where he has countermanded its payment.¹⁹

13. *Gibbs v. Hopper*, Ark., 160 S. W. Rep. 879; *Heartt v. Rhodes*, 66 Ill. 351; *Lawrence v. Schmidt*, 35 Ill. 440; *Industrial Bank v. Bowes*, Ill., 46 N. E. Rep. 10; *Exchange Bank v. Sutton Bank*, 78 Md. 577, 28 Atl. Rep. 563; *Pack v. Thomas*, 21 Miss. 11; *Warrensburg Co-operative Bldg. Assoc. v. Zoll*, 83 Mo. 94; *Cassel v. Regier*, 114 N. Y. Supp. 601.

Notice must be given to an accommodation drawer, where the holder took the check with knowledge that the drawer had reasonable expectations that the drawee would honor it. *Mackall v. Gozzler*, Fed. Cas. No. 8,835.

14. *Warrensburg Co-operative Bldg. Assoc. v. Zoll*, 83 Mo. 94.

15. *Lawrence v. Schmidt*, 35 Ill. 440.

16. *Industrial Bank v. Bowes*, Ill. 46 N. E. Rep. 10.

17. *Pitts v. Jones*, 9 Fla. 519 quotes with approval the rule laid down by Mr. Justice Story in his work on Bills, page 311, which is as follows: "Although the drawer has no funds in the hands of the drawee, yet if he has a right to expect to have funds in the hands of the drawee to meet the bill, or if he has a right to expect the bill to be accepted in consequence of an agreement or arrangement with him * * * he is entitled to notice of dishonor."

18. *Adler v. Levinson*, 65 Misc. Rep. 514, 120 N. Y. Supp. 67.

19. *Purchase v. Mattison*, 13 N. Y. Super. Ct. 587; *Scanlon v. Wallach*, 53 Misc. Rep. (N. Y.) 104, 102 N. Y. Supp. 1090. Neg. Inst. L., Sec. 185 of the New York act.

§91. Discharge of Drawer or Indorser by Delay in giving Notice.—A delay in the giving of notice to the drawer of a check, provided notice is given before suit is brought, does not discharge the drawer, unless it appears that a loss was sustained by the drawer as a result of such delay, and in such case the drawer is discharged only to the extent of the loss suffered.²⁰

This rule, however, applies in favor of drawers only. In the case of an indorser a delay in giving notice cannot be excused on the ground that the indorser suffered no loss as a result of the delay; prompt notice must be given to each indorser, unless the same is excused by reason of other circumstances, within the rules set forth in the preceding sections, or he will be discharged from liability as indorser, irrespective of whether he has suffered loss as a result of the neglect. In some of the decisions it is apparently held that the entire want of notice of dishonor is excused where it appears that no actual loss was thereby caused to the drawer.²¹ But in these cases it generally appears that the check involved was drawn against insufficient funds and that this was the real ground upon which the failure to give notice was excused.

§92. Where Notice May Be Given to Agent.—It is not always necessary that notice of dishonor be given directly to the person to be charged. In many cases it has been held that a notice may be served upon an agent of the party. In general a notice, so served, is sufficient if it appears that the agent was authorized to receive the notice.

It has been held that a notice of dishonor might be served upon the agent of the party to be charged, where the agent transacted all the business out of which the transaction arose, and the principal's place of business was unknown to the holder.²²

20. *Williams v. Braun*, Cal., 112 Pac. Rep. 465; *Henshaw v. Root*, 60 Ind. 220; *Griffen v. Kemp*, 46 Ind. 172.

Section 3255 of the California Code provides that the drawer of a check is exonerated by a delay in presentment to the extent of the loss caused thereby. Construing this statute, it was said in *Williams v. Braun*, Cal., 112 Pac. Rep. 465; "The evident spirit and meaning of section 3255 is that delay in presentment, or in giving notice of dishonor, exonerates the drawer only to the extent of the injury he has suffered thereby."

21. *Heartt v. Rhodes*, 66 Ill. 351; *Exchange Bank v. Sutton Bank*, 78 Md. 577, 28 Atl. Rep. 563; *Pack v. Thomas*, 21 Miss. 11.

22. *King v. Griggs*, 82 Minn. 387, 85 N. W. Rep. 162.

And it was held that a notice could be served upon an agent of the payee and indorser of a draft, where the agent had authority to make and indorse drafts, and to act as the general agent of the payee in the conduct of his business, and had had full charge of the acts and dealings with the bank at which the paper was discounted and the management of the paper.²³

The mere fact that one person is the agent of another does not authorize a notice of dishonor, intended for the principal, to be served upon the agent. It must appear that it was within the scope of the agent's authority to receive such notice.²⁴ Thus, notice may not be given to the attorney for the party to be charged, where the attorney has special powers which do not authorize him to receive such a notice,²⁵ such as a mere authority to indorse.²⁶ The fact that one person is the financial agent of another does not make the agent a proper person upon whom to serve a notice of dishonor intended for the principal.²⁷

A notice of dishonor intended for a corporation must of necessity be served upon an agent of the corporation. But, to validate such a notice, it must appear that it was actually served upon an agent of the corporation and that the receipt of such a notice was within the scope of the authority of the agent served. In a New York case it was held that a notice of dishonor, personally served upon a corporation, by leaving it "at the cashier's window," without showing that it actually reached an agent or officer of the corporation, was insufficient.²⁸ Where a joint stock company indorsed a negotiable instrument, a notice given to the general agent of the company, authorized to indorse and attend to such paper, was deemed sufficient.²⁹

An agent may have implied, as well as express authority to receive notices of dishonor on behalf of his principal.³⁰ It has been held that a notice of dishonor delivered to an agent, authorized to receive and read the indorser's mail, was sufficient, al-

23. *Persons v. Kruger*, 45 N. Y. App. Div. 187, 60 N. Y. Supp. 1071.

24. *Robinson v. Aird*, 43 Fla. 30, 29 So. Rep. 633.

25. *Louisiana State Bank v. Ellery*, 4 Martin, N. S., (La.) 87.

26. *Valk v. Gaillard*, 4 Strob. L. (S. C.) 99.

27. *New York & Alabama Contracting Co. v. Selma Bank*, 51 Ala. 305.

28. *American Exchange National Bank v. American etc. Co.*, 103 N. Y. App. Div. 372, 92 N. Y. Supp. 1006.

29. *Bank of Auburn v. Putnam*, 3 Keyes (N. Y.) 343.

30. *Wilkins v. Commercial Bank*, 6 How. (Miss.) 217.

though the indorser also received mail from a post office near his residence.³¹

By the Negotiable Instruments Law it is now provided that notice of dishonor may be given "either to the party himself or to his agent in that behalf."³²

§93. To Whom Notice Should Be Given After Death of Party.—Where a party, to whom it is desired that notice of dishonor should be given, is dead, and the fact of his death is known to the party giving notice, the notice must be given to the executor or administrator of the deceased indorser or drawer, if there be one and if, with reasonable diligence, he can be found.³³ Of course, in many instances, there is no personal representative of the deceased party at the time that notice should be given. In this event notice may be sent to the last residence or place of business of the party to be charged. If, prior to his death, the party had an agent upon whom notices might be served, the agency terminates with his death, and notice may not thereafter be served upon the agent.

In a New York case, it was held that a notice of dishonor, given in an informal and casual way to an executor of a deceased indorser, after a delay of eleven days, and to the co-executor, to whom the party giving notice was referred, after a further delay of ten days, was not sufficient, where it further appeared that more than six weeks elapsed before a claim was formally presented to the executors.³⁴

§94. Giving Notice to Partners.—When persons, who are entitled to receive notice of the dishonor of a note, are partners, notice to any one partner is notice to the firm and all the partners are liable.³⁵ This is merely an application of the rule that each member of a partnership is the agent of the firm in matters within the scope of the firm's business.³⁶ But the interests of the members of a firm are not so closely interwoven that notice

31. *Crowley v. Barry*, 4 Gill (Md.) 194.

32. §168 of the New York act.

33. *Neg. Inst. Law*, §169 of the New York act.

34. *Deininger v. Miller*, 7 N. Y. App. Div. 409.

35. *Neg. Inst. Law*, §170 of the New York Act.

36. *Fourth National Bank v. Altheimer*, 91 Mo. 190.

to the indorser of a note is dispensed with by the fact that the indorser's partner was the maker of the note.³⁷

The fact that a firm is dissolved before the time for giving notice has arrived does not affect the rule. Even in that case notice to one partner of a firm which has indorsed a negotiable instrument is regarded as notice to all the partners. It is true that, after dissolution, one member of a firm is not the agent of the others for the purpose of entering into new contracts. But he is the agent of the other members of the firm for winding up the partnership affairs, at least in so far as the receiving of notice of dishonor is concerned.³⁸ Not only has one partner the right to receive notice of dishonor for the others, after the dissolution of the firm, but he has the right, at such time, to waive notice of demand and non-payment of a note indorsed by and discounted for the firm.³⁹ And it is held that, where one member of a firm which has indorsed a bill or note dies, notice of dishonor to the surviving member will bind the estate of the deceased partner.⁴⁰

§95. Notice to Persons Jointly Liable. There is a distinction, and an important one, in the matter of giving notice of dishonor, between cases where the parties to be notified are partners, and the cases where the parties are jointly liable and are not partners. The Negotiable Instruments Law provides; "Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others."⁴¹

This distinction rests upon the fact that partners are but one person in legal contemplation, that the acts of one partner, within the scope of the partnership business, bind the other partners, and that all the partners are bound by the knowledge of one as to matters relating to the partnership. These things do not pertain to the relation of joint parties to a negotiable

37. *Foland v. Boyd*, 23 Pa. 476.

38. *Neg. Inst. Law*, §170 of the New York act; *Feigenspan v. Mac Donald*, Mass., 87 N. E. Rep. 624; *Coster, Robinson & Co. v. Thomason*, 19 Ala. 717; *Fourth Nat. Bank v. Heuschen*, 52 Mo. 207.

39. *Seldner v. Mount Jackson Nat. Bank*, 66 Md. 488.

40. *Slocomb v. De Lizardi*, 21 La. Ann. 355.

41. *Neg. Inst. Law*, §171. (N. Y.)

instrument, who are not partners, and in such cases each party is entitled to individual notice.⁴²

Where but one of several joint parties is notified the notice is ineffectual even as to the party to whom notice is given.⁴³ It has been held in Tennessee that one of two joint indorsers of a note is bound by notice of non-payment given to himself alone, without notice to the co-indorser, under the statutes of that state making all joint obligations and promises joint and several, and subjecting joint obligors, including indorsers of commercial paper, to several suits.⁴⁴ But the Negotiable Instruments Law was adopted in Tennessee in 1889, four years after the rendering of this decision, and the rule in that state is now the same as in the other states which have adopted the act, making it necessary in Tennessee to give notice to each of several joint indorsers in order to hold one of them. The rule which applies to joint indorsers, not partners, applies also to joint drawers, who are not partners, and each drawer is entitled to notice.⁴⁵

§96. Notice to Bankrupt or Insolvent.—Up to the time of the adoption of the Negotiable Instruments Law there had always been doubt as to the proper person to serve with notice of dishonor, where the drawer or an indorser had become bankrupt, or had made an assignment for the benefit of his creditors, prior to the maturity of the instrument. The question presented was whether the notice could be sent to the party alone, or to the assignee alone, or whether it should be sent to both the party and the assignee. The writers of text books did not entirely agree and the decisions on the question did not harmonize. Perhaps one reason why the question was not brought up more frequently was that the average holder, not desiring to run any risk in such a case, would send notice to both the party whom he wished to hold and also to his assignee or trustee. The weight of authority, prior to the adoption of the Negotiable Instruments Law, was to the effect that, where a person had been adjudged a bankrupt, notice of dishonor might be sent to the trustee in bankruptcy, and, where he had made an as-

42. *Shepard v. Hawley*, 1 Conn. 367.

43. *People's Bank of Baltimore v. Keech*, 26 Md. 521.

44. *Jarnagin v. Stratton*, 95 Tenn. 619.

45. *Miser v. Trovinger's Executors*, 7 Ohio St. 281.

signment for the benefit of his creditors, notice could be sent to his assignee.⁴⁶

The Supreme Court of Ohio refused to adopt this doctrine of these cases and decided that, where an indorser assigned his property for the benefit of his creditors notice of dishonor must be given to the indorser himself. In this case there was, however, a strong dissenting opinion.⁴⁷

The discord among the authorities has now been swept away by the Negotiable Instruments Law, which lays down the rule that, in the cases under consideration, the notice of dishonor may be sent either to the party himself, or to his assignee or trustee as the case may be.⁴⁸

§97. By Whom Notice May Be Given.—At one time it was held that no party could give a valid notice of dishonor unless he was the holder of the dishonored instrument at the time. But this doctrine has long been overruled. Notice may now be given by the holder or by a person other than the holder, acting in the holder's behalf.⁴⁹ But, the notice must come from a proper party. The mere fact that an indorser receives a notice of the dishonor of the instrument which he has indorsed will not make him liable as indorser, unless the notice comes

46. *Callahan v. Bank of Kentucky*, 82 Ky. 231; *American Nat. Bank v. Junk Bros*, 94 Tenn. 624. In the latter case it was said: "This question has been heretofore undetermined in this State, and we are at liberty therefore, to establish that rule which is most in accord with what we conceive to be the weight of authority and reason. We are satisfied, therefore, to hold the law to be that, whenever a general assignment is made, as contemplated by our law, the assignee in such assignment so far stands in the shoes of his assignor that notice to such assignee of the nonpayment of indorsed paper will bind such indorser."

47. *House v. Vinton Nat. Bank*, 43 Ohio St. 346.

48. The Negotiable Instruments Law, §172 of the New York act, provides as follows: "Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee."

49. Section 161 of the New York Negotiable Instruments Law provides: "The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given."

It is not necessary to the validity of a notice of dishonor that it be given by a notary. *Cromer v. Platt*, 37 Mich. 132.

from a person whom the law recognizes as being vested with authority to give notice.⁵⁰ Thus, a notice of dishonor given by one who is an entire stranger to the instrument is not sufficient to charge the party thus notified with liability.⁵¹

A case, indicating that the holder of a dishonored instrument cannot take advantage of a notice coming from an unauthorized source, arose in Nebraska. It appeared that one Hofrichter, the payee of a certificate of deposit, indorsed it to the order of Enyeart. A few days before maturity the latter, without further indorsing it, intrusted it to a certain person for delivery to one Stowell, a notary public, for collection, or for demand, protest and notice. The certificate never came into the possession of Stowell, but was delivered by the messenger to a firm of attorneys in his own service. Upon becoming acquainted with this fact Enyeart wrote to the attorneys stating that he did not want them to take any steps toward the collection of the instrument. But at maturity, from excess of caution and for his own protection, a representative of the firm of attorneys, presented the instrument and, upon its dishonor because of the failure of the bank by which it was issued, protested it and gave notice of dishonor in the usual manner. This action was brought by the executor of Enyeart against Hofrichter as indorser. Although Enyeart had directed the firm of attorneys not to act for him, his executor was in the position of trying to take advantage of the notice of dishonor which they sent to the indorser. It was held that he had no rights under the notice. "The law is settled, without conflict among authorities," said the court, "that a demand or notice, to be effectual to bind an indorser, or discharge the maker or drawer paying to the person making it, must be by one having real or ostensible right to receive payment. The notary in this instance had neither."⁵²

50. *Cabot v. Warner*, 92 Mass. 522; *Hofrichter v. Enyeart*, 71 Neb. 771, 99 N. W. Rep. 658.

51. *Lawrence v. Miller*, 16 N. Y. 235; *First National Bank v. Gridley*, 112 N. Y. App. Div. 398, 98 N. Y. Supp. 445; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173.

Renick & Peterson v. Robbins, 28 Mo. 339. It was here said: "A notice given by a mere stranger is a nullity, but the notary who presents and protests the bill is regarded, to a certain extent, as the agent of the holder, and is authorized, by his character and employment, to give notice to any of the other parties on the bill."

52. *Hofrichter v. Enyeart*, 71 Neb. 771, 99 N. W. Rep. 658.

§98. Notice May Be Given by Agent of Party.—A valid notice of dishonor may be given by the agent of the holder and the agent may give the notice in his own name.⁵³ The provision of the Negotiable Instruments Law in this regard is as follows: "Notice of dishonor may be given by an agent either in his own name or in the name of the party entitled to give notice, whether that party be his principal or not."⁵⁴

This provision covers the cases in which the agent sends the notice directly to the person to be notified. There are, however, many cases in which the agent may not know the addresses of the parties to whom notice is to be given, as where a check, deposited in one bank, is sent by mail to another bank at the place where the drawee is located for collection. In such cases, or in any similar case for that matter, the rule is that the collecting bank may give notice to the principal for whom it acts, or to the parties to be charged, as it may see fit. In such case, if the collecting bank gives notice to the bank from which it received the check, it is allowed the same time for giving such notice as if it had been the owner of the check, and the latter bank is entitled to the same time for giving notice to prior parties, as if the collecting agent had been an independent holder of the check.⁵⁵ In other words the agent is treated as an indorsee of the instrument. But, if the agent fails to give notice to his principal in due time, the latter is cut off though he may thereafter use due diligence in communicating notice to antecedent parties.⁵⁶

This rule is illustrated in an Ohio decision. The Ohio Life Insurance and Trust Co. commenced an action against McCague as the drawer and indorser of a bill of exchange for six thousand dollars. The bill was drawn in Cincinnati, payable to the defendant's order at the office of the plaintiff trust company in New York. It was indorsed to the order of the trust company and forwarded by the company to its New York office for collection, with an indorsement making it payable to the order of one Vermilye, the company's cashier in New York. It was

53. *Drexler v. McGlynn*, 99 Cal. 143, 33 Pac. Rep. 773.

54. *Neg. Inst. Law*, §162 of the New York Act.

55. *Neg. Inst. Law*, §165 of the New York Act. *Linn v. Horton*, 17 Wis. 151; *Farmers' Bank v. Vail*, 21 N. Y. 485; *Ohio Life Ins. & Trust Co. v. McCague*, 18 Ohio 54, *West River Bank v. Taylor*, 34 N. Y. 128.

56. *Rosson v. Carroll*, 90 Tenn. 90.

protested for non-payment and a notice of protest, directed to the defendant was forwarded the next day to the Cincinnati office, where it was remailed on the day of its receipt to the defendant. It was held that this notice of dishonor was sufficient.⁵⁷

In another case of this kind, it appeared that one Taylor, the defendant, was the indorser of a bill of exchange and resided in New York City, where the drawee also resided. The bill was dated at Windsor, Vermont, and, after acceptance, and before maturity, was delivered to the plaintiff, a corporation at Jamaica, Vermont. The plaintiff indorsed it to a bank in Boston for collection, and that bank indorsed it, also for collection, to a bank in New York. The bill was dishonored and the New York bank, instead of giving notice to the defendant indorser directly, sent a notice for him to the Boston bank, which forwarded it to the plaintiff at Jamaica, Vermont. The plaintiff then sent the notice to the defendant in New York City.

The question raised was whether the defendant was legally charged as indorser. It was held that he was bound by the notice which he received, and that the fact that he lived in the same place with the collecting bank did not alter the situation and make it necessary for that bank to send notice to him direct. Although his notice journeyed from New York to Boston, from there to Jamaica, Vermont, and then back to New York, where the defendant resided, it was sufficient to charge him as indorser. "The holder," said the court, "is not bound to give notice to anyone but his immediate indorser, and hence the rule which was formerly asserted, namely, that the notice must come from the holder, is no longer recognized as good law."⁵⁸

57. *Ohio Life Insurance & Trust Co. v. McCague*, 18 Ohio 54. "The most stringent rules of the law merchant," said the court, "will require no more than this. The whole objection of counsel is based upon the fanciful idea that the Ohio Life Insurance and Trust Company, at Cincinnati, was embodied in the person of its cashier, Wm. M. Vermilye, in the city of New York; and that it was sending the notice of protest from itself in New York to itself in Cincinnati. We are not inclined to indulge in subtleties of this sort, and hold that Mr. Vermilye in New York, whether he be called agent or cashier, was employed by the holder of the bill in Cincinnati to present the same for payment; and, on payment being refused, to return it in due time, with the ordinary notice of protest, to his employer in Cincinnati, whose duty it would be to communicate with the other parties to the bill."

58. *West River Bank v. Taylor*, 34 N. Y. 128.

§99. Notice Given by One Party Inures to the Benefit of Others.—Where the drawer or indorser of a check is duly notified of its dishonor such notice may be taken advantage of by any subsequent party to the check, although the subsequent party did not himself send any notice. If the holder gives due notice to the first indorser of the check, the second indorser is entitled to recover thereon from the first indorser, on showing that such notice of dishonor was duly given; and, if the holder gives notice to his immediate indorser, and the notice is in this manner carried back to the drawer, the holder is entitled to bring an action thereon against any of the parties that have been duly notified.⁵⁹

§100. Form of Notice in General.—While there are certain requirements which a notice of dishonor, to be valid, must meet, the law prescribes no set phraseology for such notices. In general it may be said that notice may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment.

In the earlier decisions the courts were inclined to rule that a notice which did not comply with every technical requirement of the law was invalid. But greater leniency is shown in the later decisions. The tendency of the courts now is toward recognition of the fact that the object of requiring notice of dishonor is merely to enable the parties entitled to such notice to take the necessary measures to charge with liability all persons liable to them. If a notice, though lacking in some particular, such as a statement of the date, or maturity, or amount of the dishonored instrument, describes it in sufficient detail so that the party receiving it is not misled or confused, the notice will generally be ruled valid. In passing upon the validity of notices of dishonor, the courts will protect honest holders

59. *West River Bank v. Taylor*, 34 N. Y. 128, *Linn v. Horton*, 17 Wis. 151.

This rule is covered by sections 163 and 164 of the New York Negotiable Instruments Law. Section 163 reads as follows: "Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties, who have a right of recourse against the party to whom it is given." And this is the provision of section 164: "Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given."

of negotiable paper, who may have given an unskillfully drawn notice of dishonor, where they can do so without injustice to the party to whom the notice is sent.⁶⁰

In general a notice will be held to be sufficient if it is expressed in such terms as not to mislead the party to whom it is sent, and so designates or distinguishes the dishonored instrument as to leave no doubt in the mind of the party notified what paper was intended.⁶¹

§101. Notice Need Not Be Signed.—Under the earlier decisions a failure to sign a written notice invalidated the notice,⁶²

60. "The Law prescribes no exact form of notice. All the books agree that, if it affords reasonable information what bill it is that has been demanded and is dishonored, it will suffice; leaving every case to depend on its own circumstances as to the precise form and fulness of the notice.

* * * Notice to an indorser may contain more than is necessary, and more than is true and yet be good enough. It may contain less than the whole truth, that is less than what an exact copy of the note if sent to the indorser would give, and be good. This must necessarily be so, from the principle of law that no form of notice is prescribed, and that there is no general rule with regard to the notice other than the one already mentioned. Thus, the omission of the date of the bill, the stating of a false date, or an inaccurate statement of the amount, is neither of them, of course, fatal to the notice, as has been repeatedly held, if the notice be otherwise sufficiently full to give the needed information." *Gill v. Palmer*, 29 Conn. 54.

61. *Martin Dumeé & Co. v. Brown*, 75 Ala. 442; *Kilgore v. Bulkley*, 14 Conn. 362; *Gill v. Palmer*, 29 Conn. 54; *Spann v. Baltzell*, 1 Fla. 301, 324; *Rudd v. Deposit Bank*, 105 Ky. 443, 49 S. W. Rep. 207; *Howland v. Adrian*, 30 N. J. Eq. 41.

The provisions of the New York Negotiable Instruments Law, regulating the form of notices of dishonor, are as follows:

"§ 166. When Notice Sufficient. A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby."

"§ 167. Form of Notice. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails."

62. *Walker v. Bank of Missouri*, 8 Mo. 705; *Bank v. Dibrell*, 91 Tenn. 301.

In the case of *Walmsley v. Acton*, 44 Barb. (N. Y.) 312, it was said: "If the notice is verbal it must be given by someone thus entitled to

but these decisions have been superseded by the Negotiable Instruments Law, under which a notice is valid, though unsigned,⁶³ except in the state of Kentucky.⁶⁴

§102. Verbal Notice of Dishonor.—Under the Negotiable Instruments Law and the decisions a valid notice may be given verbally.⁶⁵ A verbal notice, however, is not good in the state of Kentucky, where the Negotiable Instruments Law was altered before its adoption so as to require a notice of dishonor to be in writing and signed.⁶⁶

give it in fact; and if written, it must appear upon its face to be so given. An anonymous notice is no notice. It is no more than notice from a stranger, or casual information of the non-payment of a bill; neither of which would be good notice." The notice in this case was subscribed merely "Respectfully yours," with no signature appended.

63. Neg. Inst. Law, §166 of the New York Act.

Printed Signature. In *Bank of Cooperstown v. Woods*, 28 N.Y. 561, it was held that a notice of dishonor does not require a written signature, and that the notary's signature thereon may be printed. In the opinion the court said: "We are not referred to any authority to show that the notice of non-payment must be signed manually by the notary. On principle, I think it unnecessary, if the name appears at the foot of the notification. It as fully acquaints the indorser of the dishonor of the note, as would the manuscript signature of a person whose handwriting he did not know; and it, certainly, is not expected, that the indorser should know the handwriting of the notary."

64. Section 95 of the Kentucky statute.

65. *Martin Dumee & Co. v. Brown*, 75 Ala. 442; *Scarborough v. City Nat. Bank, Ala.*, 48 So. Rep. 62; *Standard Sewing Mach. Co. v. Smith, Del.* 40 Atl. Rep. 1117; *Kelly v. Theiss*, 77 N. Y. App. Div. 81, 78 N. Y. Supp. 1050; *Zollner v. Moffitt*, 222 Pa. 644, 72 Atl. Rep. 285.

Neg. Inst. Law, §§166, 167 of the New York Act.

The notice of dishonor given in the case of *Woodin v. Foster*, 16 Barb. (N. Y.) 146, was verbal and was held valid. A witness here testified that he informed the indorser that the note had been presented for payment and that the maker refused to pay it. He did not describe the note by date and amount, but it was entirely clear that the indorser well understood what note was referred to and the notice was accordingly deemed sufficient.

In *Martin Dumee & Co. v. Brown*, 75 Ala. 442, it was said: "True, as is often said in the books, it is more prudent to give the notice in writing, because thereby the evidence of it will be the better preserved, in the event the fact becomes a matter of dispute. But this is far from saying that notice in writing is indispensable."

66. *Grayson County Bank v. Elbert*, 143 Ky. 750, 137 S.W. Rep. 792.

The sections in question as adopted in Kentucky are rather awkwardly phrased and read in this manner:

For a verbal notice to be valid, it must appear that the person claiming to have given verbal notice of dishonor, had such intention at the time of giving notice. Not every conversation can be distorted into a verbal notice of dishonor. Thus, where a bank requested one, who had indorsed notes to the bank after maturity, to return the proceeds of the notes, which, pursuant to the original agreement, were deposited to the indorser's credit, and were to remain as security for the payment of the notes until it could be ascertained that certain assets assigned to the bank by the makers would be sufficient, but which, without right, had been withdrawn by the indorser, it was held that such demand could not be treated as a notice of dishonor.⁶⁷

§103. Notice of Dishonor by Telephone.—Notice of Dishonor may be given by telephone, but the party giving notice must be able to show that he communicated with the indorser, or his agent in that behalf. It is not sufficient for him to show that he talked with a clerk in the indorser's office whose name he could not get.⁶⁸

"A written notice need be signed, and an insufficient written notice may be supplemented and validated by a written communication," etc.

"The notice may be in writing, and may be given in any terms which sufficiently identify the instrument," etc.

A comparison of these provisions with the corresponding provisions in other states, which are set forth in footnote 61, *supra*, will indicate how they were changed by the Kentucky legislature.

67. *German American Bank v. Atwater*, 165 N. Y. 36.

68. *American Nat. Bank v. National Fertilizer Co.*, Tenn., 143 S. W. Rep. 597. In this case it was held that the notice was not sufficient for the reason that it did not appear that notice had been given by a proper party. In the opinion it was said: "According to section 96 of the Negotiable Instruments Law the notice may be 'in writing or merely oral,' and may 'in all cases be given by delivering it personally or through the mails.' We are of the opinion that a notice by telephone would fall within the meaning of this section, if it be clearly shown that the party to be notified was really communicated with; that is, fully identified as the party at the receiving end of the line. In this case, however, Mr. Le Sueur is not clear that he ever held any communication with Mr. Connel. He testifies that his talks were with a clerk, whose name is not given; that he had several conversations with this clerk, in which he left word for Mr. Connel, and he *thinks* he succeeded one time in getting Mr. Connel. It is evident, however, in his testimony that he is not confident in this belief, while Mr. Connel is positive that he did not receive notice at all."

Notice of dishonor by telephone was held insufficient under the Negotiable Instruments Law in the case of *Mayer v. Boyle*, 132 N. Y. Supp. 729.

§104. Effect of Failure to State that Instrument Has Been Presented.—The question has been raised in some of the cases as to whether it is essential to the validity of a notice of dishonor that it expressly declared that the instrument in question was presented for payment, and payment refused.

The Negotiable Instruments Law does not require such a statement in notices of dishonor. It provides that the notice may be given in any terms which sufficiently indicate that the instrument has been dishonored by non-acceptance or non-payment. A mere statement that an instrument has been dishonored, without setting forth that it was presented and payment demanded, would seem to satisfy this requirement.⁶⁹

Among the decisions, prior to the adoption of the Negotiable Instruments Law, it was generally held that a notice of dishonor need not expressly state that the instrument was duly presented and that payment was demanded; the notice was valid if it sufficiently indicated that the instrument had been dishonored.⁷⁰

69. Negotiable Instruments Law, §167 of the New York Act.

70. *Mills v. Bank of the United States*, 11 Wheat. (U.S.) 431; *Burkam v. Trowbridge*, 9 Mich. 209; *Cromer v. Platt*, 37 Mich. 132.

It was objected in the case of *Mills v. Bank of the United States*, 11 Wheat. (U. S.) 431, 6 L. Ed. 512, that the notice of dishonor, by which it was attempted to charge an indorser with liability, did not state that a demand of payment had been made. The notice merely stated that the note "has been protested for non-payment." Answering this objection the Supreme Court, speaking through Mr. Justice Story, said: "It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is a matter of evidence to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser."

It was held in the case of *Merchants' National Bank v. Bental*, 15 Cal. App. 170, 113 Pac. Rep. 708, under the California Civil Code providing that a notice of dishonor must inform the indorser that the instrument has been dishonored, that a mere demand of payment of the indorser is not notice that a like demand has been made of the maker and that payment was refused.

The contrary rule was expressed in the case of *Graham v. Sangston*, 1 Md. 59. In the opinion it was stated: "Although no precise form of

§105. Effect of Failure to State that Drawer or Indorser is Looked to for Payment.—Although there are decisions which intimate that a notice of dishonor should notify the party to whom it is sent that the holder looks to him for payment, the cases in which the question has been actually presented decide that the omission of such a statement does not invalidate a notice. A person, who receives a notice of dishonor is presumed to know that he is looked to for payment.⁷¹

§106. Error in Notice as to Name of Party.—An error in a notice of dishonor as to the name of one of the parties, such as the omission of a name, or the incorrect statement of a name, does not render the notice invalid unless the party notified is misled as a result of the mistake.⁷² It has been held by the Supreme Court of the United States that an omission to state who is the holder of a dishonored instrument in a notice of dishonor does not affect the validity of the notice. "The whole object of the notice," said the court, "is to inform the party to

words is necessary to be used in giving the notice, yet, it is indispensable that it should, either expressly, or by just and natural implication, contain in substance the following requisites:—First. A true description of the note, so as to ascertain its identity. Second. An assertion that it has been duly presented to the maker at its maturity, and dishonored."

71. *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798; *Cowles v. Harts*, 3 Conn. 516; *Salomon v. Pfeister*, N. J., 31 Atl. Rep. 602; *Burgess v. Vreeland*, 24 N. J. L. 71.

It was held in *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798, that a notice of dishonor need not specifically state that the sender looks to the indorser for payment. He is presumed to know that he is looked to. Quoting from the opinion: "For what other purpose could the plaintiff in error (indorser) have inferred that this notice was sent to him by the holder of this note. There is no hard and fast rule that requires the notice to state in so many words that the holder looks to the indorser for payment of the note. A notice of dishonor or of protest of the paper from which it may be reasonably inferred that the holder intends to look to the indorser for payment is sufficient notice of that intention and no other inference could be reasonably drawn from this notice. A notice of non-payment and protest sent to the indorser by the holder of the note is, by necessary implication, an assertion by the holder of his right to collect of the indorser."

72. *Mills v. Bank of the United States*, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; *Sasscer v. Farmers' Bank*, 4 Md. 409; *Renick & Peterson v. Robbins*, 28 Md. 339; *Kehoe v. Manning*, 38 Mo. 294; *Dodson v. Taylor*, 56 N. J. L. 11; *Hodges v. Shuler*, 22 N. Y. 114.

whom it is sent that payment has been refused by the maker that he is considered liable, and that payment is expected of him. It is of no consequence to the indorser, who is the holder, as he is equally bound by the notice, whomsoever he may be, and it is time enough for him to ascertain the true title of the holder when he is called upon for payment."⁷³

The rule has been stated as follows; "The object of notice is to advise the drawer or indorser of the fact that the bill has been dishonored, but no particular form is required for that purpose, and it is sufficient if the words employed, either in express terms or by necessary implication, give identity to the bill and information that it has not been accepted or paid on due presentment. A misdescription of the bill will not vitiate the notice, unless it misleads the party notified, and unless the variance is such that, under the circumstances of the case, the notice conveys no sufficient knowledge to the drawer or indorser of the identity of the particular note or bill which had been dishonored."⁷⁴

The defense interposed by an indorser in one instance was that the notice of dishonor which was sent to him, misstated the maker's name, and that he was misled by the mistake. The name signed to the note was H. Jacobs. The notary, finding it illegible, sought to make a *fac-simile* of it, and in doing so wrote it "Le Cals." The address of the maker was subscribed to his name, but the notary made no attempt to find out what the name was. He made no inquiry of the officers of the bank at which the note was payable as to what the name might be. The only inquiry he made was at the bank to which the note was sent for collection, and the officers of that bank were unable to give him any information. If the signature had been so written as to lead the notary, in the exercise of due caution, to the belief that it stood for a certain name and he had so described it, such error would not have vitiated the notice. A mistake of that character would not have been attributable to the negligence of the holder or his agent in giving notice and the indorser, who passed the note into circulation, would have

73. *Mills v. Bank of the United States*, 11 Wheat (U. S.) 431.

Contra, *Home Insurance Co. v. Green*, 19 N. Y. 518, holding that a notice, which does not give the name of the maker of the dishonored instrument, is invalid.

74. *Renick & Peterson v. Robbins*, 28 Mo. 339.

been obliged to bear the consequences of the misleading defect. But where, as in this case, the name of the maker was illegible, it became the duty of the notary to exercise reasonable endeavor to ascertain the identity of the person thus indistinctly signified. It was held that the course pursued by the notary in this instance was devoid of that diligence which the rules of law exact. The notice might have been held valid had it appeared that the indorser was not misled by it. But he testified that he was misled by the error in the maker's name.⁷⁵

§107. Effect of Mistake as to Amount of Instrument.—An error in a notice of dishonor as to the amount of the dishonored instrument does not invalidate the notice, unless the party receiving the notice is misled thereby.⁷⁶

§108. Where Date Erroneously Stated or Omitted.—Under the theory that mistakes in a notice of dishonor do not invalidate it unless they tend to mislead the party to whom the notice is sent, it has been held that a notice is valid though it is undated and does not give the date of the protest.⁷⁷ Mistakes in dating notices have been held to be immaterial,⁷⁸ and notices have been held to be sufficient though they incorrectly stated the date of the dishonored instrument, or failed entirely to give it.⁷⁹

75. *McGeorge v. Chapman*, 45 N. J. Law 395.

76. *Snow v. Perkins*, 2 Mich. 238; *Bank of Rochester v. Gould*, 9 Wend. (N. Y.) 279; *Cayuga County Bank v. Warden*, 7 N. Y. 19.

In *Snow v. Perkins*, 2 Mich. 238, the amount of the dishonored note was \$200. The notice of dishonor, which properly described the note except in this particular, stated that the amount of the note was \$175. "This mistake," said the court, "does not necessarily vitiate the notice. The question in cases of this kind is, whether the indorser has been misled by the mistake; and this is a question of fact for the jury or court, in all cases where extrinsic facts are proven, going to show that the indorser was, or was not, misled by the variance, or that he was or was not indorser of other notes, between the same parties payable at the same place."

77. *Artisans' Bank v. Backus*, 36 N. Y. 100. *Contra*, *Wynn v. Alden*, 4 Denio (N. Y.) 163.

78. *Tobey v. Lennig*, 14 Pa. 483; *Derham v. Donohue*, 155 Fed. Rep. 385.

Contra. *Townsend v. Lorain Bank*, 2 Ohio St. 345, 353; *Ransom v. Mack*, 2 Hill (N. Y.) 587.

79. *Mills v. Bank of the United States*, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; *Standard Sewing Mach. Co. v. Smith*, Del., 40 Atl. Rep. 1117.

§109. Incorrect Address on Notice.—Where a notice of dishonor was addressed to one indorser, placed in an envelope directed to such indorser and delivered by the notary to another indorser of the same instrument, the notice was held invalid and insufficient to charge the indorser to whom it was delivered.⁸⁰ But, where a notice was delivered through the mail to the party for whom it was intended, in an envelope correctly addressed to him, the notice was held sufficient to charge such party, although the notice itself was directed to another party to the instrument.⁸¹

§110. Notice May Be Given by Delivering it Personally or by Sending it through the Mails.—Under the earlier decisions the rule was that, where the holder of the instrument and the person who was to be notified of its dishonor resided in the same place, notice must be personal and could not be served by mail.⁸² In applying this rule the question frequently arose as to what was to be understood as the same place or town. Some cases have held that it did not mean merely within the same corporate limits, but in the same vicinity, doing business at the same common center. They have held accordingly that, where the indorser resided outside the limits of the city or town where the presentment was made, yet transacted business and received his mail there, and there was no post office in the town where he resided, nearer to his residence, to which the notice could be sent by mail, then he was to be considered in the same place, within the meaning of the commercial rule, and entitled

Gates v. Beecher, 60 N. Y. 518; Bank of Cooperstown v. Woods, 28 N. Y. 545; Youngs v. Lee, 12 N. Y. 551; Northup v. Cheney, 27 N. Y. App. Div. 418, 50 N. Y. Supp. 389; Herrmann Lumber Co. v. Bjurstrom, 74 Misc. Rep. (N. Y.) 93, 131 N. Y. Supp. 689; Shelton v. Braithwaite; 7 Mees & Wels. (Eng.) 436.

80. Marshall v. Sonneman, 216 Pa. St. 65, 64 Atl. Rep. 874.

81. Wilson v. Peck, 66 Misc. Rep. (N. Y.) 179, 121 N. Y. Supp. 344. In this case a notice of protest was by mistake directed on its face to the maker of the protested instrument, instead of to the indorser for whom it was intended. The notice, however, was placed in a properly addressed envelope and was received by the indorser. It was held that the notice was sufficient under the Negotiable Instruments Law.

82. Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177; Nevins v. Bank of Lansingburg, 10 Mich. 546; Brown v. Bank of Abingdon, 85 Va. 95; Smith v. Hill, 6 Wis. 154.

to personal notice, as though he were actually within the limits of the city or town.⁸³

On the other hand there were authorities which held that, even under the rule of the law merchant, "the same place," referred to the corporate limits of the town or city where the presentment was made and that, consequently, where the indorser resided outside of those limits, he was not entitled to personal service, even though he received his mail within such limits.⁸⁴ Later the courts began to hold notices by mail to be valid, even where the parties resided in the same place, especially where they resided in a city having an organized system of delivering mail by carriers.⁸⁵

The distinctions made in the earlier decisions have been overcome by the express provisions of the Negotiable Instruments Law, and now, irrespective of where the parties reside or receive their mail, notice may be given either by delivering it personally, or by sending it through the mails.⁸⁶

Where a notice of dishonor is properly addressed and deposited in the post office, it is presumed to have reached the person to whom it is sent and the notice is valid, notwithstanding any miscarriage in the mails.⁸⁷ The notice need not be carried to the post office building, but may be placed in one of the street letter boxes.⁸⁸ And it has been held that delivering a properly addressed notice to a letter carrier, while making his rounds, has the same effect as placing the notice in the post office or letter box.⁸⁹

§111. Time of Giving Notice.—The time allowed for giving notice of dishonor depends upon many considerations, as whether

83. *Patrick v. Beazley*, 6 Howard (Miss.) 609.

84. *Westfall v. Farwell*, 13 Wis. 504.

85. *Walters & Harvey v. Brown*, 15 Md. 285; *Shoemaker v. Mechanics' Bank*, 59 Pa. 79.

86. *Neg. Inst. L.*, §167 of the New York Act.

American Exchange Nat. Bank v. American Hotel Victoria Co., 103 N. Y. App. Div. 372, 92 N. Y. Supp. 1006.

87. *Central National Bank v. Stoddard*, Conn., 76 Atl. Rep. 472; *Wooley v. Lyon*, 117 Ill. 244; *Pier v. Heinrichshoffen*, 67 Mo. 163; *Renshaw v. Triplet*, 23 Mo. 213; *State Bank v. Solomon*, 84 N. Y. Supp. 976.

88. *Johnson v. Brown*, 154 Mass. 105; *Casco Nat. Bank v. Shaw*, 79 Me. 376; *Wood v. Callaghan*, 61 Mich. 402; *Phoenix Brewing Co. v. Weiss*, 23 Pa. Super. Ct. 519.

89. *Pearce v. Langfit*, 101 Pa. 507.

the notice is given personally or sent by mail, whether the parties reside in the same place or in different places, and whether there are circumstances present which in any way affect the limitation of time within which to give notice. The question sometimes arises as to how soon after the dishonor a notice may be sent out. It is generally held that the notice may be sent as soon as the instrument is dishonored and that the holder need not wait until the close of the day before giving his notice.⁹⁰

When the parties reside in the same place, and the notice is given personally to the party to be charged, it must, if given at a place of business, be given during business hours on the day following the day of dishonor, and if given at a residence it must be given before the usual hours of rest on the day following the day of dishonor.⁹¹ When the parties reside in the same place and the notice is sent by mail, it should be deposited in the post office in time to reach the party to be charged in the usual course on the day following.⁹²

There has been much conflict among the authorities as to when notice should be given where the parties reside in different places. At first it was supposed to be necessary that notice should be sent by the next post after dishonor, on the same day, if there was a post on that day. That rule was found inconveniently stringent and then it was held that notice could be posted on the day following dishonor. Some of the authorities held that, where there were several mails leaving on the day following dishonor, notice might be sent by any one of them. Others laid down the rule notice should be sent by the first practical and convenient post of the following day.⁹³

The rule now is that, where the notice is sent by mail, it must be deposited in the post office in time to go by mail on the day following dishonor. But, if there is no mail at a convenient

90. *Ex-parte Moline*, 19 Vesey (Eng.) 216; *Etheridge v. Ladd*, 44 Barb. (N. Y.) 69; *Merchants' Bank v. Elderkin*, 25 N. Y. 178.

91. *Adams v. Wright*, 14 Wis. 408.

92. *Lockwood v. Crawford*, 18 Conn. 361; *Phelps v. Stocking*, 21 Neb. 443; *Siegel v. Dubinsky*, 56 Misc. Rep. (N. Y.) 681, 107 N. Y. Supp. 678; *Wilson v. Peck*, 66 Misc. Rep. (N. Y.) 179, 121 N. Y. Supp. 344.

93. *Smith v. Poillon*, 87 N. Y. 590; *Mackintosh v. Gibbs*, N. J., 80 Atl. Rep. 554; *Sanderson's Admr. v. Sanderson*, 20 Fla. 292; *Crosby v. Patton*, 76 Minn. 40, 78 N. W. Rep. 874.

hour on that day, then the notice will be good if it goes by the next mail thereafter.⁹⁴ And where the parties reside in different places and the notice is given otherwise than through the post office, it must be given within the time that notice would have been received, had it been given within due time by mail.⁹⁵

When the dishonored instrument is drawn or made in one state and is payable in another state, the time within which notice should be given is determined by the law of the state where payment is to be made.⁹⁶ A party to an instrument, who receives notice of its dishonor, has, after the receipt of such notice, the same time for giving notice to parties prior to him, whom he wishes to hold, that the holder had after dishonor to send out the original notice.⁹⁷

§112. Place to which Notice of Dishonor May Be Sent.—

When an indorser has added his address to his signature notice must be sent to that place. This act on the part of an indorser is an invitation to the holder to send the notice to the place designated and concludes the indorser so that he may not deny that the address given was a proper one for the purposes of giving notice.⁹⁸ If no address is added to the signature of a party, notice may be sent to the post office nearest his residence, or to the post office where he is accustomed to receive his letters.⁹⁹

94. Neg. Ins. L., Section 175 of the New York Act. First Nat. Bank v. Miller, Wis., 120 N. W. Rep. 820.

Proof that notice of protest, properly addressed and stamped, was deposited in the post office at the place of protest in time to go by the first mail on the following day, establishes due notice. Farmers' Nat. Bank v. Howard, W. Va., 76 S. E. Rep. 122.

95. Neg. Inst. L., Section 175 of the New York Act. Bank of Columbia v. Lawrence, 1 Peters (U. S.) 578 Jarvis v. St. Croix Mfg. Co., 23 Me. 287.

96. Brown v. Jones, 125 Ind. 375, 25 N. E. Rep. 452.

97. Neg. Inst. L., Section 178 of the New York Act. Jurgens v. Wichmann, 108 N. Y. Supp. 881.

98. Neg. Inst. L., Section 179 of the New York Act. Bartlett v. Robinson, 39 N. Y. 187.

Where an indorser stated to the holder of a note that he resided at Pagosa Springs, Colo., a notice of dishonor sent there is sufficient to charge him as indorser. Archuleta v. Johnston, Colo., 127 Pac. Rep. 134.

99. Bank of the United States v. Carneal, 2 Peters, (U. S.) 543; Montgomery County Bank v. Marsh, 7 N. Y. 481; *In re* Mandelbaum, 141 N. Y. Supp. 319; Mercer v. Lancaster, 5 Pa. 160.

When it appears that a party lives in one place and has his place of business in another, notice may be sent to him at either place;¹⁰⁰ a notice sent to a place where the party does not reside, nor have his place of business, nor customarily receive his mail is not binding.¹⁰¹ The fact that a person is temporarily away from home or his place of business does not effect the validity of a notice sent to his usual address.¹⁰² But, where a person is sojourning in another place, notice may be sent to the place of sojournment.¹⁰³ In any case where a notice is actually received by the party, to whom it is sent, in due time, the party is charged although the notice was not sent in accordance with the rules regulating such notices.¹⁰⁴

100. *Neg. Inst. L.*, Section 179 of the New York Act. *Bank of America v. Shaw*, 142 Mass. 290; *Bank of the Commonwealth v. Mudgett*, 44 N. Y. 514; *Berridge v. Fitzgerald*, 10 B. & S. (Eng.) 668.

101. *Branch Bank at Decatur v. Pierce*, 3 Ala. 321; *Northwestern Coal Co. v. Bowman*, 69 Ia. 150; *Moore v. Hardcastle*, 11 Md. 486; *Citizens' Nat. Bank v. Cade*, 73 Mich. 449; *University Press v. Williams*, 48 N. Y. App. Div. 188, 62 N. Y. Supp. 986; *Fonseca v. Hartman*, 84 N. Y. Supp. 131; *Ebling Brewing Co. v. Reinheimer*, 32 Misc. Rep. (N. Y.) 594, 66 N. Y. Supp. 458; *Albany Trust Co. v. Frothingham*, 50 Misc. Rep. (N. Y.) 598, 99 N. Y. Supp. 343; *Woods v. Neeld*, 44 Pa. 86.

102. *First Nat. Bank v. Reid*, Tenn., 58 S. W. Rep. 1124; *Marr v. Johnson*, 9 Yerg' (Tenn.) 1; *Lowell Trust Co. v. Pratt*, 183 Mass. 379, 67 N. E. Rep. 363.

103. *Graham v. Sangston*, 1 Md. 59; *Chouteau v. Webster*, 6 Met. (Mass.) 1; *Bank of Commerce v. Chambers*, 14 Mo App. 152.

104. *Neg. Inst. L.*, Section 179 of the New York Act. *Moreland's Assignee v. Citizens' Savings Bank*, 97 Ky. 211, 30 S. W. Rep. 637; *Dicken v. Hall*, 87 Pa. 379; *Rolla State Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. Rep. 51; *Terbell v. Jones*, 15 Wis. 253.

CHAPTER IX.

PROTEST.

- §113. Necessity For Protest.
- §114. Right to Collect Protest Fees.
- §115. By Whom Protests May Be Made.
- §116. Form of Protest.
- §117. Presentment by Notary Making Protest.
- §118. Protest of Lost Check.
- §119. Time and Place of Protest.
- §120. Certificate of Protest as Proof.

§113. Necessity for Protest.—The term “protest,” in a popular sense, includes all the steps necessary to fix the liability of a drawer or indorser, upon the dishonor of commercial paper.¹ In a strictly legal sense the term means the formality which is attended to by a notary when a dishonored instrument is delivered to him for the purpose of fixing the liability of the parties.

Formal protest is essential for the purpose of charging drawers and indorsers only where the dishonored instrument appears on its face to be a foreign bill of exchange, that is one which appears on its face to have been drawn in one state and to be payable in another.²

1. *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. Rep. 239; *Sherman v. Ecker*, 109 N. Y. Supp. 678; *Wittich v. First Nat. Bank*, 20 Fla. 843.

2. The Negotiable Instruments Law, §260 of the New York Act, provides: “Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.”

In *First Nat. Bank v. German Bank*, 107 Ia. 543, 78 N. W. Rep. 195, it was said: “The distinction between a foreign and an inland bill of exchange should not be overlooked. To charge the makers and indorsers,

A bank check, appearing on its face to be drawn in one state and payable in another is a foreign bill of exchange and protest is an indispensable step in charging the drawer and indorsers. Proof of presentment and non-payment cannot be supplied in any other way.³ While it is not essential to formally protest an inland check, that is one drawn and payable in the same state, such a check may be protested at the option of the holder.⁴ And, when such a check is protested, the certificate of protest is admissible in evidence as *prima facie* proof of the facts therein recited.⁵

the former must be protested. Not so with the latter. All that is required is a demand, and, on refusal to pay, notice of dishonor, in order to fix liability of the indorsers of an inland bill, and these may be made and given by the holder, or anyone acting in his behalf."

Waiver of protest, see, *supra*, §89.

Liability of collecting bank for failure to protest, see, *infra*, Collection of Checks §193.

3. Joseph v. Salomon, 19 Fla. 623; First Nat Bank v. German Bank, 107 Ia. 543, 78 N. W. Rep. 195; Commercial Bank v. Varnum, 49 N. Y. 269, 275; Halliday v. McDougall, 20 Wend. (N. Y.) 81; Casper v. Kuhne, 140 N. Y. Supp. 86; Mankey v. Hoyt, S. D., 132 N. W. Rep. 230.

4. Henshaw v. Root, 60 Ind. 220; Griffen v. Kemp, 46 Ind. 172; Mutual Nat. Bank v. Rotage, 28 La. Ann. 933; Moses v. Franklin Bank, 34 Md. 574; Wood River Bank v. First Nat. Bank, 36 Neb. 744, 55 N. W. Rep. 239; German Nat. Bank v. Beatrice Nat. Bank, 63 Neb. 246, 88 N. W. Rep. 480; Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. Rep. 955.

In Wittich v. First Nat. Bank, 20 Fla. 843, the plaintiff gave the defendant bank his check on another bank in the same place in payment of a draft. Upon presentment, the drawee bank told the defendant bank that the check was good and would be paid at half past one o'clock, the usual hour for exchanging checks between banks at the point where this transaction arose. The defendant, however, without further demand on the drawee, caused the check to be protested by a notary. The court held that although protest of the check was unnecessary, the defendant was within its rights in having it protested. In the opinion it was said: "Although a protest of plaintiff's check may have been unnecessary, it cannot be inferred that any injury was suffered by the plaintiff in consequence of it, and there is no allegation of special damages sustained by means of any wrongful, malicious or wilful conduct of the defendant in the matter. The unnecessary act of protesting a check is not necessarily a wrongful action. If a man sustains a damage by the wrongful action of another he is entitled to a remedy, but to give him that title two things must occur; damage to himself and a wrong committed by the other party."

5. See, *infra*, this chapter, §120, Certificate as Proof.

Protest is not required to fix the liability of parties to a non-negotiable instrument,⁶ and is dispensed with by any circumstances which would dispense with the giving of notice of dishonor.⁷

§114. Right to Collect Protest Fees.—Where protest is one of the indispensable steps to charge a drawer or indorser with liability, there is no doubt that the party so charged is liable for the protest fees incurred by the holder of the instrument, but where protest is not essential, as in the case of a promissory note or an inland bill or check, the right of the holder to collect protest fees is not so well settled. It has been held where an inland check is protested, such protest not being necessary to charge the drawer, the notary's fees cannot be charged up against the drawer.⁸ There are, however, decisions to the effect, that protest fees may be collected, even though protest was not indispensable, as in the case of a local check or a promissory note, under statutes permitting such protest to be made and making the certificate of protest admissible in evidence.⁹

6. *Bank of Mobile v. Brown*, 42 Ala. 108; *Kampmann v. Williams*, 70 Tex. 568; *Ford v. Mitchell*, 15 Wis. 304.

It is not necessary to protest a check payable in confederate currency for the reason that the instrument, not being payable in money, is not negotiable. *Bank of Mobile v. Brown*, 42 Ala. 108.

7. *Neg. Inst. L.*, §267 of the New York Act. As to when notice of dishonor is dispensed with, see, *supra*, §88, 89, and 90.

8. *Wittich v. First Nat. Bank*, 20 Fla. 843.

9. In the case of *German Nat. Bank v. Beatrice Nat. Bank*, 63 Neb. 246, 88 N. W. Rep. 480, it was held that, protest fees might be recovered on a bank check drawn and payable in the state. This conclusion was reached under section 6 of chapter 41 of the Compiled Statutes of Nebraska, which provides as follows: "It shall be lawful for any person or persons having a right to demand any sum of money upon any protested bond, note, or bill of exchange as aforesaid, to commence and prosecute an action for principal, damages, interest, and charges of protest against the drawers, makers, or indorsers, jointly or severally, or against either of them separately. And judgment shall and may be given for such principal, damages, charges, and interest upon such principal, after the date aforesaid, at the time of such judgment, together with costs of suit."

Under a statute making a notary's certificate of protest admissible as evidence, it was held that the protest of a note was on the same footing as the protest of a foreign bill of exchange, and that protest fees should be allowed in an action on a note which had been protested as in the case of a foreign bill of exchange. *Legg v. Vinal*, 165 Mass. 555.

§115. By Whom Protest May Be Made.—The validity of a protest is sometimes questioned, because of the fact that the notary who made out the protest was an officer or stockholder in the bank which held, or owned, the paper. It is generally held, that the fact that a notary owns stock in a bank, or is an officer in a bank, does not disqualify him from acting as notary in protesting paper belonging to the bank. But there is enough uncertainty in the question raised, especially in view of the fact that very few of the courts of the different states have had occasion to pass upon the question, to make it advisable for a bank to obtain, if possible, the services of a notary in protesting its paper, who is neither a stockholder in, nor an officer of the bank.

It has been held, as stated, that a notary may act as such in protesting paper belonging to, or held by, the bank, although he is an officer of the bank.¹⁰ And it has also been held, that the fact that a notary is a stockholder in the bank, does not

10. A notary may act as such in protesting paper belonging to or held by a bank, although he is an officer of the bank. *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798; *Moreland's Assignee v. Citizens' Savings Bank*, 97 Ky. 211; *Dykman v. Northridge*, 1 N. Y. App. Div. 26.

In *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798, it was said: "It is argued that the certificate of protest and the notice were incompetent, because the notary was the cashier of the bank that held the note. It is true that when the rule prevailed which disqualified any party interested in an action from testifying in the cause, some of the courts held that a party in interest could not protest commercial paper, on the ground that, inasmuch as he could not testify to the presentment, demand, and notice, he was disqualified from making evidence of these facts by his certificate. *Herkimer County Bank v. Cox*, 21 Wend. 119, *Bank v. Porter*, 2 Watts. 141. But, in the circuit courts of the United States, interest in the litigation no longer disqualifies a witness, and this rule falls with its reasoning. A notary public who is the cashier of a bank may now legally protest its paper."

In *Moreland's Assignee v. Citizens' Savings Bank*, 97 Ky. 211, the court said: "It is insisted that the notary being cashier of, and a stockholder in, the bank could not legally protest the bill. To sustain this contention the cases of *Herkimer Co. Bank v. Cox*, 21 Wend. 119, and *Bank v. Porter*, 2 Watts. (Pa.) 141 are cited. In these cases the court proceeded upon the idea that as the notary was incompetent as a witness by reason of his interest, under the law of New York and Pennsylvania, therefore his certificate should not be competent to prove demand and notice. If the reasoning of the court in these cases was then good it would not now be in this case because the fact that the notary had an interest in the bank does not render him incompetent as a witness against

disqualify him from protesting paper delivered to him for that purpose by the bank.¹¹

The holder of a check is not bound to rely upon the agency of a notary public in order to have it protested, although that is the most usual and convenient procedure. If there be no notary available, then the protest may be made by any respectable resident of the place where the check is dishonored in the presence of two or more credible witnesses.¹²

§116. Form of Protest.—When the holder of an inland check or note protests it for his own convenience in providing proof as to the taking of the necessary steps to charge the parties to the instrument, it is not always a serious matter if the certificate of protest is defective in form. Even if the certificate is thrown out because not in proper form, evidence as to presentment the parties to the bill in suit. Our statute declares him to be a competent witness."

In *Dykman v. Northridge*, 1 N. Y. App. Div. 26, it was held that the cashier of a bank, although himself the maker of a note held by the bank, could act as notary in protesting the note, and that a notice of dishonor sent by him to an indorser was sufficient to charge the indorser with liability. In the opinion the court said: "We see no reason why Vail, acting as agent for the bank, could not notify his indorser that he had not paid the note, or why as a notary he might not protest the same for non-payment. Certainly there was no person better posted as to the fact than he, and the act itself is not such as violated any obligation or was inconsistent with his official duty as a notary. Vail testifies that the note came into his hands for presentation for payment. This fixes the date when it was, that he then protested it in the usual way by mailing to defendant's address a notice stating that the note described had not been paid, that it had been presented for payment, and that payment had been refused, and the note protested for non-payment. This complied in all essential respects with the law, and constituted a sufficient notice to charge the indorser."

11. *Patton v. Bank of Lafayette*, 124 Ga. 965, 53 S. E. Rep. 664; *Bank of Ravenswood v. Wetzel*, 58 W. Va. 1, 50 S. E. Rep. 886.

In *Herkimer Co. Bank v. Cox*, 21 Wend. (N. Y.) 119, it was held, that in an action by a bank on a promissory note which had been protested by a notary who was a stockholder in the bank, the certificate was not admissible in evidence to prove protest presentment and notice. The ground upon which this decision is based was that the notary himself was incompetent as a witness by reason of his interest in the note. This decision is explained in the cases quoted from in the preceding note.

12. *Neg. Inst. Law*, §262 of the New York Act.

Todd v. Neal's Administrator, 49 Ala. 266; *Donegan v. Wood*, 49 Ala. 251.

and notice of dishonor, sufficient to charge an indorser, may be given by the persons who actually made presentment and gave notice; but in the case of a foreign bill of exchange, where formal protest is absolutely necessary, in order to charge a drawer or indorser with liability, it is of the highest importance that the certificate be regular as to form. If, for any reason, a certificate is insufficient, the person in whose behalf it was made out, will lose his right of action, for proof as to presentment and notice cannot be furnished in any other way.¹³

The certificate of protest must sufficiently designate or identify the dishonored instrument. This is usually done by attaching the certificate to the instrument, or incorporating a copy of the instrument in the certificate.¹⁴ And the certificate must be executed under the seal of the notary making it.¹⁵ The certificate must be signed, and while it has been held that the notary's signature to a certificate may be written thereon by

13. See *supra*, §113.

The form of protest is provided in the Negotiable Instruments Law, §261 of the New York Act: "The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found."

14. *Fulton v. Maccracken*, 18 Md. 528. Under the Negotiable Instruments Law it is now specifically provided that the certificate must be annexed to the bill or must contain a copy thereof. See preceding note.

15. *Peirce v. Indseth*, 106 U. S. 546; *Donegan v. Wood*, 49 Ala. 251.

London & River Plate Bank v. Carr 54 Misc. Rep. (N. Y.) 94, 105 N. Y. Supp. 679, involved a motion to set aside a verdict in favor of the holder of three bills of exchange drawn upon parties residing in Brazil. The ground upon which the motion was urged was that the certificates of protest which accompanied the bills, while they purported to show that the bills had been protested in Brazil, did not bear the seals of the officer by whom the protest had been made. It did not appear whether the protesting officer had an official seal, or whether he was required to use one under the law of Brazil, but it was held that the absence of the seal rendered the certificates inadmissible in evidence and the verdict for the plaintiff was set aside.

In *Bank of Rochester v. Gray*, 2 Hill (N. Y.) 227, the court stated the rule as follows: "And it would be going too far to say, contrary to what is believed to be the universal practice, that a protest, purporting to be made by a notary, should be received as evidence, per se, without a seal.

a clerk¹⁶ it may be questioned whether such a signature would be deemed valid, in view of the present provision of the Negotiable Instruments Law, requiring the certificate to be "under the hand and seal of the notary making it."¹⁷

The certificate must state that the instrument was presented, and it must specify the time, place and manner of such presentment.¹⁸ It must also set forth the cause for the protest

In *Rex v. Scriveners*, 10 Barn. & C. 518, Lord Tenterden said: 'Many documents pass before notaries, under their notarial seal, which gives effect to them, and renders them evidence in foreign courts.' In *Las Cygas v. Larionda's Syndics*, 4 Mart. (La.) 283, 285, Matthews, J., said: 'In case of protested bills of exchange, the certificate of a notary public, authenticated by his seal of office, is received in the courts of the United States as full proof of the drawer's refusal to accept or pay the bill.' Vide 3 Kent's Com. (4th Ed.) 93, note B. I am not aware of any case wherein the protest has been received as, in itself, such full proof without being authenticated by seal. It will be proof, perhaps where the act first appears to have been done under a local law by an officer who has no official seal. *Caune v. Sagory*, 4 Mart. (La.) 81. But we are asked to sanction its reception as absolute proof, without anything appearing to excuse the want of such a formality. This we think cannot be done."

But see *Huffaker v. National Bank*, 75 Ky. 287, where it was held that a notarial seal is not an essential part of a certificate of protest and that the official signature of the notary is all that is required. The effect of this decision, however, is overcome by the Negotiable Instruments Law, making the seal necessary.

16. *Fulton v. Maccracken*, 18 Md. 528.

17. Neg. Inst. Law, §261 of the New York Act.

18. Neg. Inst. Law, §261 of the N. Y. Act.

People's Bank v. Brooke, 31 Md. 7; *Legg v. Vinal*, 165 Mass. 555; *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535; *Duckert v. Von Lileinthal*, 11 Wis. 55.

A certificate of protest in the following form "I, H. W., notary public, do hereby certify that I have this day protested for non-payment the annexed bill," though properly dated and signed, is insufficient; a specification of the place and manner of presentment, and the person to whom presentment was made, being necessary to bind indorsers. *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535.

A certificate of protest of a note payable at a bank which merely stated that the note had been presented for payment without specifying where the presentment was made, is insufficient. *Peoples' Bank v. Brooke*, 31 Md. 7.

A certificate which stated that the notary presented the note for payment at Montello and demanded payment which was refused, but failed to state to whom or at what place in the town the presentment was made, was held not to show a sufficient presentment to charge an indorser. *Duckert v. Von Lileinthal*, 11 Wis. 55.

and the answer given by the drawee to the demand for payment.¹⁹

§117. Presentment by Notary making Protest.—When an instrument is turned over to a notary for purposes of protest, it has generally already been presented by the holder; it is nevertheless, necessary for the notary to again present the instrument and demand payment thereon. There is considerable conflict among the decisions as to whether such presentment must be made by the notary personally, or, whether it will be sufficient if the presentment be made by the deputy or clerk of the notary who draws up the certificate of protest. In general it may be said that, in the absence of any statute or local usage to the contrary, the notary who makes out and signs the protest must personally present the protested instrument and demand payment, and that he cannot perform this duty through an agent.²⁰ A protest has been held insufficient where it appeared that presentment had not been made by the notary, who signed the certificate of protest, but by another notary.²¹

When the validity of a protest is questioned upon the ground that the instrument was not presented personally by the notary who signed the certificate of protest, evidence is admissible to establish a custom for presentment and demand to be made in such cases by notaries' clerks, instead of by the notaries themselves.²² But, if the action is on a foreign bill of exchange, it must appear that the custom includes and applies to foreign bills

19. Neg. Inst. Law. §261 of the N. Y. Act.

20. Donegan v. Wood, 49 Ala. 251; Ocean Nat. Bank v. Williams, 102 Mass. 141; Hunt v. Maybee, 7 N. Y. 266.

21. Commerical Bank of Kentucky v. Barksdale, 36 Md. 563.

22. In Commercial Bank v. Varnum, 49 N. Y. 269, which was an action against the notary for neglecting to make proper presentment and demand of a foreign bill of exchange, it was held that the notary was entitled to introduce evidence to the effect that there was a custom, at the place where the bill was payable, for notaries' clerks to make such presentment and demand, and that the bill in question was presented and payment demanded by the defendant's clerk. It was also held that a knowledge of this custom on the part of the plaintiff was not necessary to its validity. In the opinion it was said: "Has, then, a notary's clerk any authority to make the presentment and demand of payment of a foreign bill? This presentment and demand for the purpose of protest are practically of no moment to anyone. Bills are always dishonored, before they are handed to a notary to protest. They have always been first presented and payment refused, and are then

of exchange, in order that evidence as to the existence of the custom may be admitted.²³

§118. Protest of Lost Check.—Where a check is lost, a copy of it may be protested.²⁴ This situation is covered by the Negotiable Instruments Law, which provides as follows: "Where a bill is lost or destroyed, or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof."²⁵

§119. Time and Place of Protest.—A check should be protested at the place where it is dishonored,²⁶ and the protest delivered over for protest. (Chitty on Bills, 13th Ed., 45.) The only practical benefit to anyone is the notice of the dishonor to the prior parties to the bill to enable them to protect themselves. It may possibly at some time be of some importance as evidence of the dishonor. Whether practically beneficial or not, however, as the law requires it, it must be done.

"Conceding the rule the common law to be, in the absence of any custom or usage on the subject, that the presentment and demand must be made by the notary in person, was the testimony offered, of the universal usage in the city of New York for the clerk of the notary to make such presentment and demand admissible? It may be remarked that the usage of merchants has established the great body of law in reference to bills of exchange. * * *

"In the absence of any established rule of law in this state, by decision of the court or by any statute, requiring a demand to be made by the notary in person, it is not perceived why a usage such as was approved was not admissible as proof upon the subject."

23. In *Ocean Nat. Bank v. Williams*, 102 Mass. 141, which was an action against the indorser of a foreign bill of exchange, payable in the city of New York, it was shown that the bill was presented, not by the notary personally, but by a clerk in his employ. The plaintiff attempted to overcome this defect by testimony to the effect that it was the custom in New York for presentment and demand of payment of drafts to be made by notaries' clerks. It was held that this testimony was insufficient to validate a protest made in this manner without proof that the custom applied to, and included, foreign bills of exchange.

A certificate of protest of a note in which it appears that presentment was not made personally by the notary signing the protest, but was made by his clerk, is not sufficient to charge the indorsers of the note with liability. In such a case, however, inasmuch as formal protest is not essential, presentment may be established by the testimony of the clerk who actually presented the note. *Hunt v. Haybee*, 7 N. Y. 266.

24. *Kavanaugh v. Bank*, 59 Mo. App. 540. See also *Hinsdale v. Miles*, 5 Conn. 331.

25. The Negotiable Instruments Law, §268 of the New York Act.

26. *Neg. Inst. L.*, §264 of the New York Act.

should be made on the day on which the default occurs; however, it is not essential that the certificate of protest be drawn up at the time of the protest. If the protest is duly noted at the time, that is, if a note or memorandum of what is done is made by the notary at the time of the presentment and dishonor, the certificate of protest may be drawn up thereafter.²⁷

Delay in noting or protesting will be excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence, but when the cause of delay ceases to operate, the instrument must be noted or protested with reasonable diligence.²⁸

§120. Certificate of Protest as Proof.—Under the statutes of the various states, a certificate of protest is generally made evidence of the facts therein stated. The certificate is admissible in evidence without proof that the notary's signature is genuine, or, in fact, that he was a notary at the date of the protest.²⁹ And it is evidence of the facts therein stated, although the notary, when examined, has no recollection of them.³⁰ In the event of the certificate being lost, the notary may make out another one, which may be read in evidence with the same effect as the original.³¹

27. *Commercial Bank v. Barksdale*, 36 Mo. 563.

In *Union Nat. Bank v. Williams Milling Co.*, 117 Mich. 535, it was said that it is not essential that the certificate be made out at the time of the protest. If a note or memorandum is made by the notary at the time of the presentment and dishonor of the instrument showing what was done, a certificate thereafter drawn up from that memorandum would be sufficient. It was here held that a certificate in proper form would be presumed to set forth the facts therein stated correctly, even though it was dated more than six months after the actual protest.

28. *Neg. Inst. L.*, §263 and §267 of the New York Act.

29. *Johnson v. Brown*, 154 Mass. 105, 106; *Halliday v. McDougall*, 20 Wend. (N. Y.) 81.

Where it is proper to protest an inland check, although such protest is not necessary, the certificate of protest is admissible in evidence. *Moses v. Franklin Bank*, 34 Md. 574.

Under a statute making the certificate of protest of a notary public *prima facie* evidence of the facts therein certified, a certificate is admissible in evidence even in the case where protest was not indispensable. *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798.

30. *Sherer v. Easton Bank*, 33 Pa. St. 134.

31. *Kellam v. McKoon*, 31 Hun (N. Y.) 519.

CHAPTER X.

ALTERED CHECKS.

- §121. Liability of Bank to Depositor Where It Pays Altered Check.
- §122. Duty of Depositor to Examine Account for Irregular Payments.
- §123. Duty of Drawer to Exercise Care in Preparing Check.
- §124. Right of Drawee Bank to Recover Money Paid on Altered Check.
- §125. Duty of Party Making Payment on Altered Check to Give Notice.
- §126. Rights of Bona Fide Holder of Altered Check.

§121. Liability of Bank to Depositor where it Pays Altered Check.—Where a bank pays a check, which has been altered in any material respect without the knowledge or consent of the drawer, it will not be permitted, in the absence of special circumstances, to charge the amount of the check against the drawer's account.¹

One of the reasons upon which this rule is based is that a bank receives its depositor's funds upon the implied condition that it will disburse them only in accordance with his orders. It is said that the bank is from necessity responsible for any omission to discover the original terms of a check, once properly drawn upon it, because at the time of the payment, it is the only party interested in protecting its integrity, who has the opportunity of inspection, and that the law, therefore, imposes upon it this duty of guarding the fund entrusted to it from spoliation.² This does not, however, fully express the liability of the bank in making payments of this kind, for there are cases in which the alteration is so skillfully made that no examination

1. *Chicago Savings Bank v. Block*, 126 Ill. App. 128; *Crawford v. The West Side Bank*, 100 N. Y. 50; *Morris v. Beaumont Nat. Bank*, 37 Tex. Civ. App. 97, 83 S. W. Rep. 36.

2. *Crawford v. The West Side Bank*, 100 N. Y. 50.

the bank could reasonably be expected to make would disclose the fraud. But even, under such circumstances the bank is responsible to its depositor. The liability rests on the ground that an unauthorized payment has been made rather than on the ground that the bank failed to detect the alteration.³

Where the drawer of two checks stopped payment and transferred his account to another bank to guard against the possibility of payment, the second bank having no knowledge of the checks, and the checks were paid by the second bank, its name having been fraudulently substituted as drawee by the holder, it was held that the second bank was liable to the drawer.⁴ In some instances, where the alteration consists in raising the amount of the check, the bank is held responsible to the depositor only for the amount by which the check was raised and is permitted to charge against the depositor's account the amount for which the check was originally drawn.⁵ But, where a depositor drew a post-dated check and left it with his agent, to be used in paying the expenses of the depositor's business during his absence, and the agent altered the date, cashed the check and absconded, it was held that, while there is authority for allowing a bank to hold an altered check against the drawer according to its original tenor, the rule did not apply here for the reason that "the check was never a valid instrument for any purpose, because it had become vitiated by a fraudulent alteration before it had any inception."⁶

This general rule, under which a bank is held responsible to its depositor, where it pays a check drawn by him, which has been materially altered without his knowledge or consent, has its limitations and exceptions, as general rules usually have, and is modified to the extent that, when some negligent act on the part of the depositor has contributed to the payment by the bank, the depositor may be estopped from denying the correctness of the payment.⁷ In a California case, where the plaintiff

3. Chicago Savings Bank v. Block, 126 Ill. App. 128; Crawford v. The West Side Bank, 100 N. Y. 50.

4. Morris v. Beaumont Nat. Bank, 37 Tex. Civ. App. 97, 83 S. W. Rep. 36.

5. Clark v. National Shoe & Leather Bank, 32 N. Y. App. Div. 316; *In re Beer*, 124 N. Y. Supp. 423.

6. Crawford v. The West Side Bank, 100 N. Y. 50.

7. Otis Elevator Co. v. First Nat. Bank, Cal., 124 Pac. Rep. 704. See, *infra*, §123.

company was a depositor in the defendant bank, it appeared that the plaintiff's bookkeeper, who was entrusted with the duty of filling out checks for signature by the plaintiff's manager and also of cashing checks, drawn on the plaintiff's account and payable to bearer, raised the amount of one of the plaintiff's checks, and, after obliterating the payee's name, made it payable to bearer, and cashed it at the bank. In another instance he prepared a check so that it could be easily raised and, after raising the amount, cashed it. It was held that, inasmuch as the cashing of these checks was within the apparent scope of the bookkeeper's authority, the plaintiff could not hold the bank liable.⁸

It has been held that the delivering of a check to a stranger, with whom the drawer had no business relation, in exchange for currency equal to the amount of the check, is not such negligence as would preclude the drawer from recovering from the bank, where the check was paid by the bank after having been fraudulently raised.⁹

A check is invalidated by a material alteration, even though the alteration is made without any wrongful motive. Thus, where a check was by mistake drawn on the wrong bank, and the cashier of the bank on which the check should have been drawn altered the name of the drawee to make the check correspond with the intention of the parties, it was held that the check was thereby rendered void.¹⁰

8. *Otis Elevator Co. v. First National Bank*, Cal., 124 Pac. Rep. 704.

Where the plaintiff drew checks upon the defendant bank, enclosed them in sealed envelopes, and gave them for mailing to a clerk, who knew the contents of the envelopes, and the clerk abstracted two checks, drew a pencil line through the words "or order," inserted in ink the words "or bearer," and cashed them, it was held that the plaintiff, in giving the letters to the clerk to mail, was not guilty of such negligence as would preclude him from recovering from the bank. *Belknap v. National Bank of North Dakota*, 100 Mass. 376.

9. *National Bank of Virginia v. Nolting*, 94 Va. 263, 26 S. E. Rep. 826. "Drawing the check in favor of the stranger was not the proximate cause of the loss. The forgery was the immediate cause, and that could have been as readily perpetrated by an acquaintance. To hold that giving a check to a stranger, where no business relation existed between the drawer and himself, was sufficient evidence of negligence to excuse the bank, and impose the loss upon the drawer, if the check was forged by raising it to a larger amount than it was given for, would be to release the banks from the just responsibility imposed upon them by law."

10. *Whitsett v. People's Nat. Bank*, 138 Mo. App. 81, 119 S. W. Rep. 999.

The question whether a check has been altered is one of fact to be determined by the jury from the evidence presented for its consideration.¹¹

§122. Duty of Depositor to Examine Account for Irregular Payments.—The obligation which rests upon a depositor to examine his pass book, when it is balanced by the bank and returned to him, and to look over the returned vouchers, and report to the bank any discrepancies found therein, has been fully discussed elsewhere in this volume.¹²

§123. Duty of Drawer to Exercise Care in Preparing Check.—Speaking of negotiable instruments generally, it has been held in many jurisdictions that, where the drawer or maker of a bill or note prepares it so carelessly that alteration may easily be made, either by insertion or erasure, without defacing the instrument or exciting the suspicion of a careful man, and the opportunity thus afforded is embraced and the instrument raised in amount, the maker or drawer will be liable upon it as raised to any holder in due course. This holding has been placed on several different grounds: first, that the drawer is estopped by his negligence; second, that where one of two innocent persons must suffer a loss through the wrong of a third person, he shall sustain the loss who put it in the power of the third person to commit the wrong; third, that it is the duty of one issuing commercial paper to guard not only himself, but the public as well, by refusing to sign an instrument in such form as to permit of alteration with ease and without ready detection; and fourth, that the free interchange of commercial paper requires such a rule. Other authorities refuse to hold to this doctrine upon any ground, claiming that the person who issues a negotiable instrument owes no duty to subsequent purchasers and that he is entitled to rely upon the presumption that it will not be criminally altered.

11. *M. Jones & Co. v. Bank of Horatio*, Ark., 143 S. W. Rep. 1060.

Check Drawn on Safety Paper. In an action by the drawer of a check against the drawee bank, to recover the amount of an altered check alleged to have been paid by the bank, the fact that the check was drawn on safety paper, (which turns white if washed with acid,) and yet does not show any trace of alteration, is evidence that the check was not altered. *Mitchell v. Security Bank*, 147 N. Y. Supp. 470.

12. Duty of depositor to examine pass book and returned vouchers for forged and raised checks: See chapter XI, Forged Checks, §147-151.

But, whatever may be the just rule in respect to promissory notes and ordinary bills of exchange, it is apparent that there is a ground on which to distinguish checks, for the relation between a bank and its depositor is essentially different from that which is found to exist between the parties to a promissory note or ordinary bill of exchange. In regard to a bill or note no one is bound, in the absence of special agreement, to purchase it or become a party to it in any manner. But a bank is bound to honor its depositor's checks at its peril. Hence it is a just rule to require the depositor to exercise reasonable care in the preparation of his checks to the end that loss may not be thrown unnecessarily upon the bank.¹³

In an early English decision, it appeared that the plaintiff, having occasion to be absent from home, left with his wife certain checks signed by him in blank, to be filled in by her and used as business might require. She delivered one of these checks to the plaintiff's clerk to be filled in for the sum of fifty pounds. The clerk wrote the word fifty in the middle of the blank line left for that purpose and began it with a small letter. He showed the check to the plaintiff's wife, who directed him to draw the cash. Before doing so he raised the check to Three hundred and fifty pounds, the alteration being rendered easy of accomplishment by the manner in which the check was prepared, and drew the larger sum. It was held in this case that the plaintiff could not recover from his banker the money which he claimed had been paid out without authority.¹⁴

This case was followed in a recent New York decision, in which it appeared that a wife signed a check which her husband had filled out for the sum of \$900, leaving spaces which enabled him to raise the check to \$4,900. He raised the check in this manner and withdrew the entire amount. In an action by the wife against the drawee bank it was held that the question whether the wife was so negligent as to preclude her from recovering from the bank, was a matter for the determination of the jury.¹⁵ In the opinion in this decision it was said: "If a check

13. *Trust Co. of America v. Conklin*, 65 Misc. Rep. 1, 119 N. Y. Supp. 367.

14. *Young v. Grote*, 4 Bing. (Eng.) 253.

15. *Timbel v. Garfield Nat. Bank*, 121 N. Y. App. Div. 870, 106 N. Y. Supp. 497. In the opinion it was said: "The text books are quite unanimous in asserting that, where a drawer of a check has prepared

appears to have been altered the banker is put on inquiry as to the correctness of the alteration and he pays it at his own peril. Where, however, the alteration is such as to excite no suspicion because the check has been drawn by the maker in such a way as to invite an unsuspecting alteration, the law makes an exception to the rule that a banker pays at his own peril and permits him to assert negligence on the part of the maker in so drawing his check."

It is held, however, that, while the drawer of a check may not recover from his banker where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration, he is not bound so to prepare the check that nobody can successfully tamper with it.¹⁶

§124. Right of Drawee Bank to Recover Money Paid on Altered Check.—Where a bank, in good faith and without negligence, pays, even to an innocent holder, a check drawn upon it, which has been fraudulently and materially altered, it may recover from such holder the amount paid, under the general rule that money paid under a mistake of fact may be recovered back.¹⁷

his check so negligently that it can be easily altered, without giving the instrument a suspicious appearance and alterations are afterwards made, he can blame no one but himself, and that in such case he cannot hold the bank liable for the consequences of his own negligence in that respect." Citing 5 Cyc 544; Daniels on Negotiable Instruments, 5th Ed., Sec. 1659; Morse on Banks & Banking, 4th Ed., Sec. 480; Zane on Banks & Banking, Sec. 154; Story on Promissory Notes, 7th Ed., 675.

16. *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. Rep. 969.

17. *Redington v. Woods*, 45 Cal. 406; *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Third Nat. Bank v. Allen*, 59 Mo. 310; *National Park Bank v. Eldred Bank*, 90 Hun (N. Y.) 285; *National City Bank v. Westcott* 26 Wkly. Dig. (N. Y.) 161; *Oppenheim v. West Side Bank*, 22 Misc. Rep. (N. Y.) 722.

The indorsement of the holder, in such case, amounts to a representation and warranty that the check is genuine, upon which the bank may rely. *City Bank of Houston v. First Nat. Bank*, 45 Tex. 203.

In *White v. Continental Nat. Bank*, 64 N. Y. 316, the plaintiff, as drawee, accepted and paid a draft, which had been raised from \$27 to \$2,750. It was held that the plaintiff could recover from the innocent holder of the draft, to whom payment had been made. The court said: "The plaintiffs, as drawees of the bill, were only held to a knowledge of the signature of their correspondents, the drawers; by accepting and paying the bill they only vouched for the genuineness of such signatures,

A drawee is bound to know the signature of his drawer, but there is no presumption that he is acquainted with the handwriting in the body of the check, inasmuch as checks are often filled up in a handwriting other than the drawer's, with which the drawee has no opportunity of becoming familiar. Consequently the drawee is not precluded from recovering the money paid on an altered check. If the rule were otherwise a drawee could never safely pay a check, filled up in a handwriting with which he is unacquainted until he has satisfied himself that the check is entirely regular.¹⁸

Even where a person receives and pays for a check in reliance upon the statement of an officer of the drawee bank that the check is "good" or is "all right," and the bank subsequently pays the check, the bank is not estopped from recovering the amount paid. The bank is bound by law to know the status of its depositor's account and it is bound to know whether the depositor's signature is genuine. And the statement that the check is good will be limited to these two matters. It cannot be distorted into a representation that the check has not been altered or tampered with, for the holder has the same means of ascertaining this fact as has the drawee.¹⁹

Mere negligence in paying a raised check will not preclude

and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder. * * * The defendant as holder of the bill, and claiming to be entitled to receive the amount thereof from the drawees, was held to a knowledge of its own title and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument."

In *Third National Bank v. Allen*, 69 Mo. 310 it was said: "As money paid under a mistake of fact may always be recovered back, one who pays forged paper, by discounting or cashing it can always recover it back provided he has not contributed to the mistake himself and he has given a sufficiently early notice of the mistake to the other party after he has discovered it.

18. *Redington v. Woods*, 45 Cal. 406.

19. *Espy v. Bank of Cincinnati*, 85 U. S. 604, 21 L. Ed. 947; *Parke v. Roser*, 67 Ind. 500. In the latter case it was said: "We can see no reason why the drawee of a check should be held to pay a forged check, where the forgery consists in altering the body of the check, upon an oral promise to pay (if presented) during banking hours, when he could not be held liable on his written certification of it."

the drawee bank from recovering unless the party to whom the payment was made will be prejudiced thereby. Thus, where the holder of a check had paid cash for it before presenting it to the drawee, and the drawee afterwards paid the amount to the holder, it was held that the drawee could recover from the holder, notwithstanding that, at the time of the payment the drawee had in its possession a list of checks drawn by the particular drawer, an examination of which would have disclosed the fraud.²⁰

Banks handling checks for collection have been held to occupy a more favorable position in regard to payments on altered checks than do other holders of such instruments. It has been held that, where a draft is sent by a bank to its correspondent bank indorsed for collection, and it is discovered after payment that the draft had been raised, the correspondent acts merely as agent for the forwarding bank, and that the drawee cannot recover from such correspondent, provided the latter has paid the amount over to the forwarding bank before notice of the mistake.²¹

20. *Merchants' Bank v. Exchange Bank*, 16 La. 457.

21. *Wells-Fargo & Co. v. United States*, 45 Fed. Rep. 337; *National City Bank v. Westcott*, 118 N. Y. 468; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28. In the case last cited a check on the Park Bank for \$8 was raised by the payee to \$1,800 indorsed in blank by him and delivered to the Eldred (Pa.) bank for collection only. The Eldred Bank indorsed the check "for collection" to the Seaboard Bank, New York, and that bank received payment. It was held that the Seaboard, appearing by the indorsement to be a mere agent was not liable after it had paid over the money to its principal.

A \$12 check of the Bank of Woodland, Cal., on the Crocker-Woolworth National Bank of San Francisco to the order of A. H. Dean, a depositor in the Nevada Bank, was raised by Dean to \$22,000, indorsed generally, and deposited with the Nevada Bank for collection. That bank placed its clearing-house stamp on the check and received payment of it through the San Francisco Clearing House. The following day, Dean checked out \$20,000 from the Nevada Bank and fled. The forgery was discovered 18 days after the check was paid. It was held that, where equally innocent persons have dealt with one another under a mistake, the loss is ordinarily left where the parties have placed it, unless it is against conscience for the one receiving money paid by mistake to retain it. In this case, by the affirmative error of the Crocker-Woolworth Bank, the Nevada Bank paid the money received to its principal, Dean, and thus changed its position so that if compelled to refund it would suffer loss. Under these circumstances the Crocker-Woolworth Bank was not entitled to recover. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. Rep. 456.

In such a case the drawee bank is estopped from claiming that the check was not what it purported to be.²²

By some of the authorities the drawee is not allowed to recover the entire amount paid out on a raised check, but is limited to the amount by which the check was raised.²³ This rule has been incorporated into the Negotiable Instruments Law.²⁴

§125. Duty of Party Making Payment on Altered Check to Give Notice.—A drawee or other person who has paid an altered check is under an obligation to give reasonably prompt notice to the person to whom the payment was made, upon discovering the forgery. The drawee or other person is entitled to a reasonable time in which to discover the forgery and demand restitution, and the question as to what is a reasonable time is usually a question of fact to be determined under the circumstances of each particular case. The party to whom the payment was

Rule changed by Negotiable Instruments Law. The purport of the earlier decisions is that the indorsement of a bank, which receives a check already indorsed "For collection" does not warrant the genuineness of the check, but warrants merely the bank's relation as agent as shown by the form of the indorsement under which it holds. The law in this regard, however, has been changed by the Negotiable Instruments Law, section 116 of the New York Act, which provides that *every indorser* who indorses without qualification warrants the genuineness of the instrument.

22. *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. Rep. 456. Where "the forgery consists in changing the body of the check so as to raise the amount, as the drawee is not charged with knowledge of the handwriting of whomsoever may have prepared the body of the check, he may, even if negligent, recover upon the ground of mistake, provided that his recovery would not pass the burden of loss over to an innocent payee, who had changed his condition upon faith of the payment. That is to say, where the drawee has done any act to give currency to the paper, as by acceptance, etc., on the faith of which the holder has taken it, or the condition of the holder will be altered for the worse in any way, or where he received the check for collection and paid over the proceeds to the principal before he received notice of the alteration, then the party paying is precluded from recovering by the ordinary rules of estoppel—otherwise not."

23. *Redington v. Woods*, 45 Cal. 406; *Merchants' Bank v. Exchange Bank*, 16 La. 457. See also *Oppenheim v. West Side Bank*, 22 Misc. Rep. (N. Y.) 722; *Smith v. State Bank*, 54 Misc. Rep. 550, 104 N. Y. Supp. 750.

24. Neg. Inst. Law, §205 of the New York Act.

made and from whom recovery is sought, however, cannot avoid his liability to refund by showing that he did not receive prompt notice of the forgery after its discovery unless he also shows that he was damaged as a result of the delay.²⁵

In a Missouri case it appeared that R. & Co. drew a check for \$20 on the plaintiff bank payable to a stranger. On the same day, a stranger representing himself to be in the employ of R. & Co. went to the defendant and negotiated for the purchase of a quantity of gold. He later returned with R. & Co.'s check payable to the order of the defendant for the exact amount of the gold previously negotiated for. Defendant collected the check and it was afterwards found that this check was the same which had been issued to the stranger by R. & Co. and that it had been altered as to the payee and raised in amount. The drawee discovered the forgery on the day after the check was paid and notified the defendant on that day, or the day following. It was held that under these circumstances the drawee was entitled to recover.²⁶

An unreasonable delay in giving notice, after discovering the fact that a raised check has been paid, will preclude the drawee bank from recovering from the party to whom the payment was made. Thus, where a drawee bank, for reasons of its own, waited for nearly five years, after having knowledge that it had paid a raised check, before giving notice thereof,

25. *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Third Nat. Bank v. Allen*, 59 Mo. 310; *Oppenheim v. West Side Bank*, 22 Misc. Rep. (N. Y.) 722; *New York Produce Exchange Bank v. Twelfth Ward Bank*, 135 N. Y. App. Div. 52, 119 N. Y. Supp. 988.

In *Oppenheim v. West Side Bank*, 22 Misc. Rep. 722 it was said: "It is well settled that a person who has received the proceeds of raised commercial paper cannot avoid his liability to refund by showing that, after the loss had occurred, the person seeking to recover was negligent in discovering the forgery, or after its discovery, in giving him timely notice unless in the latter contingency it is coupled with proof that he was damaged by such failure to notify him within a reasonable time. There was no proof whatever that the bank was negligent in giving notice to the customer of the forgery after its discovery; on the contrary, the undisputed evidence shows that the customer was informed by the bank of the forgery on the day that it first received notice. Moreover, the proofs failed to show that the customer was damaged by delay, if there was any, in receiving notice of the forgery after its discovery."

26. *Third Nat. Bank v. Allen*, 59 Mo. 310.

it was held not entitled to recover from the bank which had received the payment.²⁷

§126. Rights of Bona Fide Holder of Altered Check.—The material alteration of a check, duly signed and delivered, although done in such a manner as to leave no mark or indication observable by a man of ordinary prudence, avoids the check as against anyone who was not a party to the alteration and had no notice thereof, even though the check be in the hands of a holder in due course.²⁸ Under the provisions of the Negotiable Instruments Law it is the rule that the bona fide holder of an altered instrument may recover thereon according to the original tenor of the instrument.²⁹ But, where the alteration of a check is apparent on its face, the indorsee is not a holder in due course and is not entitled to recover on the check in any amount.³⁰

27. *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455. "The record does not show that the long delay of nearly five years in giving notice of the raising or altering of the draft has not resulted in loss to the appellee (defendant). It is to be presumed under the facts of this case that there has been a change of circumstances in the position of the parties otherwise liable, and therefore that through the negligence of the appellant (plaintiff) in not promptly notifying appellee of the alteration of the draft, the appellee has been prejudiced; and if prejudiced, it follows that the delay in giving said notice was unreasonable and under the authorities such delay as would preclude recovery."

28. *M. Jones & Co. v. Bank of Horatio*, Ark., 143 S. W. Rep. 1060; *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. Rep. 892; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 21 N. E. Rep. 408.

29. Section 205 of the New York Statute provides as follows: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

30. *Elias v. Whitney*, 50 Misc. Rep. (N. Y.) 326, 98 N. Y. Supp. 667. In this case the date of the check on which suit was brought had been altered from September 7th to September 3rd, the alteration being apparent on the face of the instrument.

CHAPTER XI.

FORGED CHECKS.

- §127. Liability to Depositor Where Bank Pays Check Bearing Forgery of his Signature.
- §128. Bank Not Allowed to Recover Money Paid on Forged Signature.
- §129. Bank May Recover Where Holder Not Prejudiced.
- §130. Bank May Recover Where Holder Negligent.
- §131. Duty of Indorsee Taking Check from Stranger.
- §132. Indorsement Does Not Warrant Genuineness of Signature.
- §133. Right of Drawee to Follow Proceeds of Forged Check.
- §134. Right of Drawee to Recover Under Negotiable Instruments Law.
- §135. Bank's Liability to Depositor Where Check is Paid on Forged Indorsement.
- §136. Right of True Owner Against Drawee Bank Where Check Paid on Forged Indorsement.
- §137. Right of Drawee Bank to Recover Money Paid on Check Bearing Forged Indorsement.
- §138. Liability of Collecting Bank to Payee of Check Paid on Forged Indorsement.
- §139. Liability of Collecting Bank where Check Collected on Unauthorized Indorsement.
- §140. Agent's Authority to Indorse.
- §141. Right of True Owner of Check to Recover from Purchaser where Indorsement Forged.
- §142. Forged Indorsement where Check Delivered to Impersonator.
- §143. Forged Indorsement where Check Delivered to One Wrongfully Assuming Authority as Agent.
- §144. Rights of Holder of Check Delivered to Impersonator.
- §145. Liability of Bank where it Pays Check on Forged Indorsement of Name of Fictitious Payee.

- §146. Right of Bank to Recover Money Paid on Forged Indorsement of Name of Fictitious Payee.
- §147. Depositor's Duty to Examine Pass Book and Returned Vouchers.
- §148. Extent of Depositor's Duty to Examine Account.
- §149. Time Within Which Examination Must be Made.
- §150. Examination Entrusted to Clerk by Whom Forgery is Committed.
- §151. Duty of Depositor to Examine Account for Forged Indorsements.
- §152. Depositor's Duty to Notify Bank of Payment on Forged Check.
- §153. Statute of Limitations as to Payment on Forged Check.

§127. Liability to Depositor where Bank Pays Check Bearing Forgery of his Signature.—There is a rule of law to the effect that a bank is bound to know the signatures of its depositors. The law presumes that a bank knows the signature of every one of its depositors, at least to the extent that, where it pays a check on which the drawer's signature is a forgery, it cannot charge the amount to the depositor's account, in the absence of negligence or fraud on the part of the depositor. It makes no difference how cleverly the forgery is done, nor under what circumstances of caution and good faith the payment was made. The forgery may be so near like the genuine as to defy detection by the depositor himself, and yet the bank is liable to the depositor if it pays the check.¹ In other words, a bank

1. *Second Nat. Bank v. Gibboney, Ind.*, 87 N. E. Rep. 1064; *First Nat. Bank v. Marshalltown Bank*, 107 Iowa 327, 77 N. W. Rep. 1045; *Neal v. Coburn*, 92 Me. 139, 42 Atl. Rep. 348; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Harter v. Mechanics' Nat. Bank*, 63 N. J. Law 578; 44 Atl. Rep. 715; *Yarborough v. Banking Loan & Trust Co.*, 142 N. C. 377, 55 S. E. Rep. 296.

Where three persons who were not partners deposited money in a bank and the bank paid checks on which the signature of one of the parties was genuine and the signatures of the other two were forged the bank was held liable to those whose signatures were forged. *Innes v. Stephenson*, 1 Moody & R. (Eng.) 145.

"The relation between a bank and its depositor is that of debtor and creditor and the implied contract on the part of the bank is that it will disburse the money standing to the credit of the depositor only on his order and in conformity with his directions. When, therefore, it makes a payment upon a check to which the depositor's name has been forged,

which has paid a forged check will not be permitted to cast upon its depositor, whose check it purported to be, the burden of recovering the money from the person to whom the payment was made. It must, itself, make good to the depositor the amount which it claims to have paid out of his deposit.²

A bank is liable, irrespective of its good faith, in paying a forged check. It cannot, for instance, rely on the statement of the person presenting a check, that he had authority to sign the depositor's name thereto; where it pays a check under such circumstances and it is afterwards found that the check is a forgery, because signed without proper authority, the bank must make restitution to the depositor.³

The rule, under which a bank is liable to its depositor for the amount paid on a check bearing a forgery of his signature, does not apply with the same force in a case where the relationship of banker and depositor does not exist between the parties. In such a case the bank is not bound at its peril to ascertain whether a check paid by it bears a genuine signature but is required only to exercise ordinary care and to act in good faith. Thus, in a case, where, without consideration, a bank receives from a money lender a sum to be delivered to one of his customers on a check to be drawn by such customer, and the bank pays the money on a check received in due course of business,

* * * it must be held to have paid out its own funds and cannot charge the amount against the depositor unless it shows a right to do so on the doctrine of estoppel or because of some negligence chargeable to the depositor." *Harter v. Mechanics National Bank*, 63 N. J. L. 578, 44 Atl. Rep. 715.

"There is no question of trust, therefore, between the parties, but their relation is purely a legal one; and if the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril, and pays out its own funds and not those of the depositor. It is in view of this relation of the parties and of their rights and obligations, that the principle is usually maintained, that banks and bankers are bound to know the signatures of their depositors, and that they pay checks purporting to be drawn by them at their peril." *Hardy v. Chesapeake Bank*, 51 Md. 562.

2. *Yarborough v. Banking Loan & Trust Co.*, 142 N. C. 377, 55 S. C. Rep. 296.

3. *Georgia Railroad & Banking Co. v. Love & Good-Will Soc.*, 85 Ga. 293, 11 S. E. 616.

at the time and under the circumstances previously agreed upon, the fact that such check is a forgery will not render the bank liable for the amount. In such a case the bank is acting as a bailee without hire and is liable only where it fails to show good faith and ordinary diligence.⁴

This case is to be distinguished from one wherein the owner of land deposited a deed with a bank, with instructions to deliver the deed to the grantee, collect the purchase price and place it to the credit of the owner. In this case it was held that the deposit was a general one, creating the relationship of banker and depositor, and that the bank was liable to the owner where it subsequently paid out the money on a forged check.⁵

A depositor may, by his acts, preclude himself from holding the bank liable for a payment made on a forged check. If, for instance, a depositor should, by word or act, induce the bank in which his account is carried, the latter acting in a reasonable and prudent manner, to make payment of a forged check, the depositor would not be permitted to set up the forgery as against the bank.⁶

A bank may also be absolved from liability where the payment of a forged check has resulted from negligence on the part of a depositor. In a case, where a husband permitted his wife to sign his name to checks and then, learning that she had signed his name in certain cases without his authority, indulged in criticism of his wife, but did not notify the bank, it was held that the bank was not liable to him for the amount of a check subsequently forged by the wife.⁷ But the mere fact that a depositor leaves his check book lying around does not constitute such negligence as will free the bank from liability to him, where a clerk of the depositor, taking advantage of the opportunity, abstracts one of the check blanks, forges the depositor's signature and collects on the check from the bank.⁸ And the

4. *Peoples' Nat. Bank v. Wheeler*, 21 Okla. 387, 96 Pac. Rep. 619.

5. *Young v. Bundy*, Tex., 158 S. W. Rep. 566.

6. *Hardy v. Chesapeake Bank*, 51 Md. 562.

7. *Neal v. First Nat. Bank*, 26 Ind. App. 503, 60 N. E. Rep. 164.

8. *Mackintosh v. Bank*, 123 Mass. 393; The court here said: "The plaintiff cannot be bound by his clerk's unauthorized and criminal acts, upon any ground that would not make every merchant, who keeps on his desk in his counting room for his own use a check book containing blank forms stamped or engraved with his name, and who sometimes

mere possession by a depositor of a rubber stamp, which will make a facsimile of his signature, will not absolve the bank from liability for the amount paid on checks, forged by one who unlawfully obtained possession of the stamp and made use of it in forging the depositor's signature.⁹

§128. Bank not Allowed to Recover Money Paid on Forged Signature.—When a bank, without actual negligence or want of care, has paid a check purporting to be drawn by one of its depositors, but which in fact is a forgery, and is required, under the rule set forth in the preceding section, to make good the amount to the depositor, the question arises as to what may be the right of the bank to recover back the money thus paid out, from the person to whom the payment was made. If the bank can reach the person by whom the fraud was committed, or one who received the money with knowledge of such fraud, its right to recover is clear.¹⁰ But in the usual case the payment is made by the drawee bank to some other bank, or to some individual, who had no knowledge of the forgery and received the payment entirely in good faith. The weight of authority on this question is to the effect that a drawee bank, having paid a check bearing a forgery of the drawer's signature, may not recover the money back from a party who received payment of the same in good faith. While this rule represents the weight of authority, an examination of the decisions, passing upon this question, discloses that, at the present time, the law is in an unsettled condition and the right of a drawee bank to recover in such a case depends largely upon the circumstances involved and the jurisdiction in which the question arises.

When a bank pays a check bearing a spurious signature, it is apparent that the payment is made under a mistake of fact. And it is a well settled rule of law that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been, unless the payment has caused such a

directs his clerk to fill them up for himself to sign, responsible for any number and amount of such checks to which the clerk may forge the signature of his employer."

9. *Robb v. Pennsylvania Co.*, 186 Pa. St. 456, 40 Atl. Rep. 969, 41 L. R. A. 695.

10. As to right of drawee bank to follow money, paid to forger, into hands of third party, see §133.

change in the position of the party receiving the payment, that it would be unjust to require him to refund. And the tendency of the modern authorities is to extend rather than restrict the operation of this rule. But this rule, like all rules of law, has its exceptions. The one prominent exception to the rule under consideration has to do with the payment of forged checks or bills of exchange. More than one hundred and fifty years ago Lord Mansfield, in the now famous case of *Price v. Neal*,¹¹ decided that the rule would not work in favor of a drawee who paid a bill of exchange, on which the drawer's signature was a forgery, and that the drawee could not recover the money paid on such bill from the innocent holder, to whom the payment had been made. "It was incumbent," said Lord Mansfield, "upon the plaintiff to be satisfied that the bill drawn upon him was in the drawer's hand, before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it." And the courts of this country have been following this decision, with more or less consistency, every since. Since that time it has been repeatedly held by the courts that, when the drawee of a check or bill pays it to a bona fide holder, he cannot recover the money back upon discovering the check or bill to be a forgery, in a case where the payment was made to an innocent party.¹²

11. *Price v. Neal*, 3 Burr. (Eng.) 1354, decided in 1762.

12. *Young v. Lehman*, 63 Ala. 519; *Redington v. Woods*, 45 Cal. 406; *Deposit Bank of Georgetown v. Fayette Nat. Bank*, 90 Ky. 10; *Neal v. Coburn*, 92 Me. 139, 42 Atl. Rep. 348; *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Germania Bank v. Boutell*, 60 Minn. 189, 62 N. W. Rep. 327; *Pennington County Bank v. First State Bank*, 110 Minn. 263, 125 N. W. Rep. 119; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402; *Stout v. Benoist*, 39 Mo. 277; *National Bank of Rolla v. First Nat. Bank*, 141 Mo. App. 719, 125 S. W. Rep. 513; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Trust Company of America v. Hamilton Bank*, 127 N. Y. App. Div. 515, 112 N. Y. Supp. 84; *Title Guaranty & Trust Co. v. Haven*, 126 N. Y. App. Div. 802, 111 N. Y. Supp. 305; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207, 50 N. E. Rep. 723; *Cherokee Nat. Bank v. Union Trust Co., Okla.*, 125 Pac. Rep. 464; *First Nat. Bank of Cottage Grove v. Bank of Cottage Grove, Oregon*, 117 Pac. Rep. 293; *Farmers' & Merchants Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. Rep. 939; *Moody v. First Nat. Bank*, 19 Tex. Civ. App. 278; *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. Rep. 761; *Johnston v. Commercial Bank*, 27 W. Va. 343.

In this country the earliest published judicial decision upon this question appears to have been made in 1802. An innocent holder of

One court has gone so far as to hold that a drawee bank, having paid a forged check, could not recover the money from the bank, to which payment was made, even where the latter bank had dealt with the forger and had not paid the entire amount over to him.¹³

Not only is a bank required to know the signatures of its depositors, but it must know who are and who are not depositors. Thus where a bank paid a check, the pretended drawer of which was not a depositor, it was held that it could not recover the money from the party to whom the payment was made.¹⁴

The reason usually given for refusing to permit a bank to recover the money which it has paid on a forged check is that it is impracticable for the indorsee or holder of a check to know

a check for value presented it for deposit to his credit in the bank upon which it was drawn. The bank received it, and credited the amount to the holder and debited the same to the supposed drawer. It soon proved to be a forgery, whereupon the bank charged the amount back to the holder's account. The holder then brought an action against the bank, and recovered judgment. *Levy v. Bank of U. S.*, 1 Binney (Pa.) 27.

13. *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 59 N. E. Rep. 62. In this case the clerk of one Fenno, a depositor in the defendant bank, deposited two checks in Fenno's account. The checks were payable to cash and purported to be drawn on the plaintiff bank by one Clancy, who was a depositor in the plaintiff bank. At the time of the deposit the clerk received a part of the amount in cash and the balance was credited to Fenno. It was later discovered that the checks were forged and that the clerk was the forger. Fenno afterwards over-drew his account, but made the overdraft good, and his deposit exceeded the amount of the forged checks after the defendant was notified of the forgery. "The plaintiff's argument," said the court, "is directed to proving that we should not adopt the rule laid down in *Price v. Neal*, 3 Burr, 1354, according to which a drawee paying a forged draft or check to a bona fide purchaser cannot recover back the money paid. We are aware that this rule has been questioned by some text writers. But it is of such universal or nearly universal acceptance that we shall go into no extended discussion."

14. *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. (N. Y.) 101. In the opinion it was said: "Knowledge of the genuineness of the signature is but one of several facts which it is important for a drawee to know, before accepting or paying a bill. He must ascertain first, whether the drawer is a person he knows, and has business relations with; second, whether the state of accounts between them will justify or require him to accept or pay. A mistake in either of them is as fatal as in regard to the genuineness of the signature."

or learn whether the drawer's signature is genuine, and that the drawee has the best means of knowing or learning that fact; or, as sometimes expressed, the drawee bank is presumed to know the signature of its depositor.¹⁵ One authority suggests that the exception to the general rule is "demanded by the necessities of business in these times, when the currency of the commercial world is composed so largely of checks and drafts."¹⁶ And it is said that, the doctrine which denies the bank the right to recover the money paid on a forged check, having been found by continuous application, to be workable, its plainness and certainty should not be obscured by fine judicial discriminations confusing to the lay mind.¹⁷

Many law writers of learning and ability have assailed this doctrine, which makes the payment of a forged check by a bank an exception to the general rule allowing a recovery of money paid under a mistake of fact. The doctrine has even been criticized by courts, which have then reluctantly proceeded to apply it, feeling bound by precedent and declaring that discussion is foreclosed by the overwhelming weight of authority. Other courts have not only criticized the doctrine, but have refused to follow it. There is no doubt that, in recent years the exceptional rule has been considerably relaxed, and banks allowed to recover the money which they have paid out on forged checks, especially under certain conditions and circumstances, reference to which will be made in the following sections. And there is no doubt that these decisions, though they break away from established precedent, represent the better and sounder rule of law.

§129. Bank May Recover Where Holder Not Prejudiced.—

By some of the authorities, which repudiate the doctrine of *Price v. Neal*, referred to in the preceding section, it is held that a bank, which pays a forged check, may recover the money thus paid, even from a holder in due course, providing the latter has not been prejudiced or misled by the failure of the drawee to detect the forgery at the time of the presentment of the check. If, after a check is paid by the drawee bank to the holder, the

15. *Neal v. Coburn*, 92 Me. 139, 42 Atl. Rep. 348; *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. Rep. 761.

16. *First Nat. Bank v. Marshalltown Bank*, 107 Iowa 327.

17. *Neal v. Coburn*, 92 Me. 139, 42 Atl. Rep. 348.

holder pays the money over to the person from whom he received the check, in reliance on the bank's action in honoring the check, then the holder may rightfully claim that the payment of the check by the bank implied its genuineness and misled the holder into paying the money over to a third party. But if, at the time of the presentment of the check, the holder has already paid value for it, then the payment of the check by the bank in no way misleads the holder. The holder has taken no step to his prejudice in reliance on the bank's action. If the bank is allowed to recover in such a case the effect is merely to place the parties in the same position they would have been in had the bank detected the forgery and refused to honor the check upon presentment. It is under these circumstances, that is, where the holder has not been misled or prejudiced by the act of the bank in paying the check, that the line of authorities with which this section is concerned allows a recovery by the bank.¹⁸

The North Dakota Supreme Court has repudiated the rule announced in *Price v. Neal*, and holds that the drawee of a forged check, which has paid the same without detecting the forgery, may, upon the discovery of the forgery, recover the money from the party who received the money, even though the latter was a good-faith holder, provided the latter had not been misled or prejudiced by the drawee's failure to detect the forgery, and that the burden of showing that he had been misled or prejudiced by the drawee's mistake rests upon him who claims the right to retain the money, for that reason. And, in refusing to follow the exceptional rule of *Price v. Neal*, the court said: "We reject as unsound the doctrine that a drawee of a check should be excepted from the general rule in relation to the recovery of money paid by mistake. The drawee is presumed to know the signature of the drawer of the check or draft; and the holder of such check or draft, who has acquired it in good faith, has the right to act in reliance on that presumption, provided he himself has omitted no duty, the performance of which would have

18. *Williamsburgh Trust Co. v. Tum Suden*, 120 N. Y. App. Div. 518, 105 N. Y. Supp. 335; *First Nat. Bank v. Ricker*, 71 Ill. 439; *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355, 30 N. E. Rep. 808; *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484, 71 Pac. Rep. 43, 60 L. R. A. 955; *First Nat. Bank v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. Rep. 546.

prevented the success of the fraud. Consequently, if the drawee pronounces the check genuine by paying it or otherwise honoring it, the holder, who has acted in good faith and without negligence, may safely rely upon the judgment of the drawee and act accordingly. The drawee cannot, under such circumstances, recall his acceptance or payment to the detriment of the party who has rightfully relied upon his decision. In such a case the party who received the money has the superior equity, and he may justly retain the money, although he was not originally entitled to receive it. But, as is usually the case, when the party who has collected the check had previously cashed it or taken it in exchange for commodities, there is no reason why he should not refund."¹⁹

A trust company, which had paid several checks bearing the forged signatures of one of its depositors, was allowed to recover the money under the following circumstances. The checks were forged by a servant of the depositor and were cashed for him by the defendant, one Tum Suden. Suden indorsed and collected the checks. In allowing the trust company to recover the amount which it had paid Suden, the latter was placed in no worse position than if the company had discovered the forgeries at the time of the presentment of the checks and refused them, for at that time Suden had already advanced the cash on the checks.²⁰

§130. Bank May Recover Where Holder Negligent.—

It has been held, in some instances, that the rule, which presumes that a bank is acquainted with its depositor's signature, and precludes the bank from recovering the money which it has paid

19. *First Nat. Bank v. Bank of Wyndmere*, 15 N. D. 299; 108 N. W. Rep. 546.

20. *Williamsburg Trust Co. v. Tum Suden*, 120 N. Y. App. Div. 518, 105 N. Y. Supp. 335. The decision, however, was not placed squarely on the ground that allowing the bank to recover was not prejudicial to the defendant. In the opinion it was said: "It was Tum Suden who had the first contact with the forger, and who first failed to detect the forgery, and upon him, therefore, the loss must fall. * * * Upon the first indorser is the burden of the first precaution, and his negligence or omission will exonerate, as in the present instance, the bank. Had a third party presented the check, already in circulation, for payment, the bank would have been put upon inquiry and for any negligence in that case it would have been responsible."

on a forged check, does not apply in favor of a holder, who by his own negligence has contributed to the success of the fraud, and whose conduct has had a tendency to mislead the bank, the latter being free from actual fault.²¹

Thus, where the holder of a check presented it to the drawee bank, after acquiring knowledge of facts calculated to arouse his suspicion that it was not genuine, without disclosing such facts, and was told by the teller of the bank that he doubted the genuineness of the signature, and would pay the check only on condition that the holder would indorse it, which the holder did, it was held that the bank could recover the money paid on the check, upon ascertaining that the signature was a forgery.²²

In one case the rule is laid down that a person receiving money from a bank upon a check purporting to be drawn upon it by one of its depositors, but the signature on which is in fact forged, is not entitled to retain the same, except upon the following combination of facts: First, that the payee was not negligent in receiving the check; second, that the payor was lacking in due care in paying the same, and third, that upon the payor's action the payee changed his position or would be in a worse condition

21. *Woods v. Colony Bank*, 114 Ga. 683, 40 S. E. Rep. 720; *Ford & Co. v. People's Bank of Orangeburg*, 74 S. C. 180, 54 S. E. Rep. 204; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610.

In *Woods v. Old Colony Bank*, 114 Ga. 683, 40 S. E. Rep. 720, it was said: "The rule that a drawee is presumed to know his drawer's signature, or at least that he is presumed to know it better than a stranger, is founded on sound reason, and is predicated upon the further presumption that the drawer is a customer or business associate of the drawee, and that their business relations have been such as to insure such knowledge on the part of the drawee. But, in determining the relative rights of a drawee, who, under a mistake of fact, has paid, and a holder who has received such payment upon a draft to which the name of the drawer has been forged, it would seem to be only fair to consider the question of diligence or negligence of the parties in respect thereto. If the holder has been negligent in paying the forged paper, or has, by his conduct, however innocent, misled or deceived the drawee to his damage, it would be unjust for him to be allowed to shield himself from the results of his own carelessness by asserting that the drawee was bound in law to know his drawer's signature. Of course the drawee must, in order to recover back from the holder, show that he himself was free from fault."

22. *First Nat. Bank v. Ricker*, 72 Ill. 439; See also *Rouvant v. San Antonio Nat. Bank*, 63 Texas 610.

if the mistake were corrected than if the payor had refused to pay the check at the time of its presentment.²³

§131. Duty of Indorsee Taking Check from Stranger.—

Many of the decisions on the right of a drawee bank to recover back the money it has paid on a forged check turn on the question whether the bank, or person to whom the check was paid, made proper inquiry at the time of receiving the check, or took it from a stranger without investigation as to his identity, or the genuineness of the check, and without disclosing such fact to the drawee. In these cases, where a bank cashes, for a person with whom it is unacquainted, a check drawn on another bank, without taking the trouble of ascertaining the holder's identity, or looking into the validity of the check, and collects the check, there is a division of authority as to the right of the drawee bank to recover the payment upon discovering that the signature on the check is a forgery. By some authorities it is expressly declared that the fact that a bank receives a check from a stranger, and does not communicate that fact to the drawee bank is not sufficient to render it liable to the drawee where the latter pays the check and afterwards discovers it to be a forgery.²⁴

In a New York decision it was said: "The defendant owed the plaintiff no duty, imposed by custom or otherwise, to inquire into the genuineness of the check. It had the right to take the risk of advancing money upon it if it was forged, or if, for any other reason, the bank was justified in refusing to pay it. The

23. *American Express Co. v. State Nat. Bank*, 27 Okla. 824, 113 Pac. Rep. 711.

24. *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Pennington County Bank v. First State Bank*, Minn., 125 N. W. Rep. 119; *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141; See also *Iron City Nat. Bank v. Peyton*, 15 Tex. Civ. App. 184, 39 S. W. Rep. 223; *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. Rep. 761.

Where a drawee bank paid a check, payable to bearer, the drawer's signature thereon being a forgery, it was held that the bank could not recover the amount from a remote indorser, who had cashed the check for a stranger without requiring his identification. *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. Rep. 939.

Where a bank, which first cashed a forged check, was negligent in so doing it was held that the negligence could not be imputed to a subsequent innocent holder of the check, so as to render him liable to the drawee bank, from which he obtained payment. *First Nat. Bank v. Marshall-town Bank*, 107 Ia. 327.

plaintiff's counter was the proper place at which to ascertain whether the check was genuine. If the plaintiff's officers and clerks omitted to exercise the care and caution they would have used had the check been presented by some other institution or person, it has its agents to blame and not the defendant."²⁵

While, as stated, it is held by some of the cases that a bank which receives a check from a stranger, is under no obligation to investigate the stranger's identity or the genuineness of the check, or to notify the drawee of the conditions under which the check was received, the weight of authority is to the effect that a bank, which cashes a check for a stranger, is bound to make reasonable inquiry as to his identity and a reasonable attempt to ascertain whether or not the instrument is valid, and that, by indorsing it, or presenting it, or putting it into circulation, the bank impliedly represents that it has performed this duty. In these cases it is held that the rule requiring a bank to know its drawer's signature does not apply and the drawee is allowed to recover the money it has paid on a forged check,²⁶ especially where it can be established that permitting a recovery will place the bank, against which the recovery is allowed, in no worse position than it would have been in, had payment of the check been refused by the drawee upon presentment.²⁷

In one instance it appeared that a man, representing himself to be R. L. Crooks, and who had in his possession a pass book, issued by the plaintiff bank to R. L. Crooks, went into the defendant bank, to the officers of which he was unknown, and asked to have his check on the plaintiff bank cashed. The defendant bank cashed the check, without inquiring into the identity of the stranger, perhaps in reliance upon the fact that he had in his possession a pass book which indicated that he was the person

25. *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. (N. Y.) 101.

26. *First Nat. Bank v. Marshalltown State Bank*, 107 Ia. 327, 77 N. W. Rep. 1045, 44 L. R. A., 131; *Woods v. Colony Bank*, 114 Ga. 683, 40 S. E. Rep. 720; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; *National Bank of North America v. Bangs*, 106 Mass. 441; *First Nat. Bank v. State Bank*, 22 Neb. 769, 36 N. W. Rep. 289; *First Nat. Bank v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. Rep. 546; *Newberry Sav. Bank v. Bank of Columbia, S. C.*, 74 S. E. Rep. 615; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Texas State Bank v. First Nat. Bank*, Tex. Civ. App., 168 S. W. Rep. 504.

27. *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484, 71 Pac. Rep. 43, 60 L. R. A. 955.

he represented himself to be. But it was held that the defendant had acted negligently and the plaintiff, upon finding out that the signature on the check was a forgery, was entitled to recover from the defendant.²⁸

A stronger case is made out where it appears that there is a local banking custom to make inquiries as to the identity of a stranger presenting a check, and that it has been ignored. In an Ohio case it appeared that a bank in Cincinnati cashed a check drawn on another bank in the same city for a stranger without inquiry. It was proved that there was a custom among Cincinnati banks to the effect that, before taking a check on another bank from a stranger, the purchasing bank would satisfy itself by inquiry as to the stranger's right to the check, and that drawee banks, paying checks to other banks in the city, relied on the presumption that the collecting bank had exercised due caution. The court, basing its decision on this custom, allowed the drawee bank to recover the money paid. It was held that the rule, precluding the drawee from disputing the drawer's signature, was based upon his supposed knowledge and the negligence imputable to him in paying without first satisfying himself as to the genuineness of the signature, and that this rule would not be applied where the holder was himself negligent in the performance of a duty imposed upon him by custom.²⁹

It cannot, of course, be stated just what measures a bank should take when a person, who is a stranger to it, asks it to cash a check drawn on another bank. The prevailing rule certainly requires that the bank should take some steps to assure itself that the transaction is not tainted with fraud. The fact that the check is presented by a stranger, without credentials, is sufficient to put the bank upon inquiry, and it owes a duty to the drawee bank to act in a prudent and business like manner and to make such inquiries as the circumstances properly require.

28. *Newberry Sav. Bank v. Bank of Columbia, S. C.*, 74 S. E. Rep. 615. In the opinion it was said: "The person or bank to whom the money is paid, in such circumstances, receives the money of another on the faith of an untrue representation that he has dealt with and received the check from the person whose name is signed to it. The rule that a bank should know the signatures of its customers is not available to one who represents to the bank that he holds in his hand the check of the customer, without having taken precautions to ascertain the identity of the person with whom he was dealing."

29. *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628.

The most natural course for a bank to pursue in such a case is to insist that the party presenting the check bring in some person known to the bank to vouch for him. Such action on the part of the bank has been held to protect the bank from liability, where it turns out that the drawer's signature was not genuine. At least it has been held that a bank, which cashed a draft on another bank, for one who was introduced to the bank by a reputable person, was not guilty of negligence in failing to make further inquiry as to the identity of the party presenting the draft, and was not liable to the drawee upon its being discovered, after the payment of the draft by the drawee, that the signature was a forgery.³⁰

§132. Indorsement Does not Warrant Genuineness of Signature.—The drawee of a check cannot rely on the indorsement of the person presenting it as a warranty of the genuineness of the drawer's signature, for, as between the holder and the drawee bank, the drawee is the proper party to pass on the question of whether or not the signature is good or bad. The indorser of a check does not warrant to the drawee that the signature of the

30. *Moody v. First Nat. Bank*, 19 Tex. Civ. App. 278. In this case a draft for the sum of \$1,000 drawn on *Moody & Co.*, of Galveston, Texas, and payable to the order of *C. W. Calhoun*, was presented at the *First National Bank of Waco* by one who falsely represented himself to be the payee. The holder of the draft was introduced at the bank by a responsible person known to the bank, but he had represented to the introducer that he was a merchant seeking to locate in Waco and had deceived him into believing that he was really the payee named in the draft. The Waco bank cashed the draft and forwarded it to a bank in Galveston by which it was collected from the drawee. It was later discovered that the signature of the drawer on the draft was a forgery, but this discovery was not made until several days after the draft had been paid. It has held that, under the circumstances of this case, *Moody & Co.* were not entitled to recover from the Waco Bank. The court said that there was no suspicious fact or circumstance connected with the purchase of the draft that would excite suspicion as to the genuineness of the drawer's signature. The introduction of the holder to the bank by a responsible party was calculated to impress the bank with the belief that it could safely engage in business transactions with the person it supposed to be *Calhoun*. This was the usual means of identification of parties who presented paper for payment, and it could not be said, because the bank did not take further steps toward the identification of *Calhoun* and did not make further inquiry into the genuineness of the signature of the drawer, that it had failed to exercise proper care and diligence in these matters.

drawer is genuine.³¹ The indorser does warrant the genuineness of the drawer's signature to all subsequent holders in due course, but the drawee bank is not a holder in due course in this sense. And it is held that a drawee bank is negligent, where it does not examine the signature closely, but passes the check in reliance on previous indorsements.³²

§133. Right of Drawee to Follow Proceeds of Forged Check.—

A bank, which has paid a forged check, will not be allowed to follow the money paid to the forger into the hands of a third party and to recover it from such third party, where the latter received it from the forger in due course of business, in good faith, and for a valuable consideration.³³

§134. Right of Drawee to Recover Under Negotiable Instruments Law.—Under the provisions of the Negotiable Instru-

31. *National Bank of Commerce v. Farmers' etc. Bank, Neb.*, 128 N. W. Rep. 522; *Cherokee Nat. Bank v. Union Trust Co., Okla.*, 125 Pac. Rep. 464.

32. *National Bank of Rolla v. First Nat. Bank*, 141 Mo. App. 719, 125 S. W. Rep. 513.

In *Farmers & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. Rep. 939, the check was drawn in the following form:

Dyer, Tenn., Oct. 28th, 1903.

Farmers' & Merchants' Bank:

Pay to J. L. Freeman, or bearer fifty-four 75/100 dollars for cotton.

Johnson Merc. Co.

The check after being indorsed by Freeman, was cashed by the Bank of Rutherford, and indorsed by it, and, after passing through the hands of four other banks, was paid by the drawee bank. Some thirty days later it was discovered that the drawer's signature was a forgery. The drawee bank then brought suit against the Bank of Rutherford. In refusing a recovery the court said: "We are of the opinion that the indorser of negotiable paper does not warrant to the drawee the genuineness of the signature of the maker, but such warranty only extends to holders in due course of trade. * * * The drawee is not a holder in due course."

As to warranties of general indorsers, see §44.

33. *Texas State Bank v. First Nat. Bank, Tex. Civ. App.*, 168 S. W. Rep. 504.

In *First National Bank v. Gibert*, 123 La. 846, 49 So. Rep. 593, it is held that, when money transferred to an honest taker has been obtained through a felony by the one transferring it, the honest taker, who received it without knowledge of the felony and in due course of business, acquires a good title to it as against the one from whom it was stolen; the right of the taker is defeated only by bad faith on his part.

ments Law, which statute has now been adopted in nearly all the states, it has been held in several instances that a drawee bank cannot recover back the money which it has paid on a forged check.³⁴

In a Missouri decision it was said: "The adoption in this and other states of our negotiable instruments law was for the purpose of having in the statutory laws of the states a uniform law in regard to commercial paper. A confusion was known to exist on many of the everyday transactions concerning such paper, and it may be said that there was no question upon which the courts were more in conflict than upon the question involved in this case. After a careful examination of the new law, we are inclined to believe that it was intended to adopt the law as declared in *Price v. Neal*."³⁵

This decision indicates that in one jurisdiction, at least, the Negotiable Instruments Law is construed to bring about a return to the antiquated doctrine of *Price v. Neal*, under which a drawee is bound to know his drawer's signature at his peril. It is to be noted, however, that in most of the cases cited in the footnote to this section it was made clear that the party of whom recovery was sought was without fault in the transaction. The decisions, therefore, holding that the Negotiable Instruments Law precludes the recovery by a drawee of the money paid on a forged check, are not to be taken as standing for the proposition that such a recovery will be denied under all circumstances of negligence on the part of the person receiving payment of the forged check. It would be unfortunate indeed if the new statute should be construed by courts generally to mean a rehabilitation of the rigid rule laid down in *Price v. Neal*, the existence of which has been long lamented by many of our courts, and the effect of which they have, in many instances, done their utmost to avoid. And it is to be seriously doubted whether the statute was ever intended to, or actually does, bring about such a result.

34. *National Bank of Rolla v. First Nat. Bank*, 141 Mo. App. 719, 125 S. W. Rep. 513; *National Bank of Commerce v. Mechanics' American Nat. Bank*, 148 Mo. App. 1, 127 S. W. Rep. 429; *National Bank of Commerce v. Farmers' Etc. Bank, Neb.*, 128 N. W. Rep. 522; *Title Guaranty & Trust Co. v. Haven*, 126 N. Y. App. Div. 802, 111 N. Y. Supp. 305; *Cherokee Nat. Bank v. Union Trust Co., Okla.*, 125 Pac. Rep. 464; *First Nat. Bank v. Bank of Cottage Grove, Ore.*, 117 Pac. Rep. 293.

35. *National Bank of Rolla v. First Nat. Bank*, 141 Mo. App. 719, 125 S. W. Rep. 513. As to the doctrine of *Price v. Neal* see §128.

§135. Bank's Liability to Depositor Where Check is Paid on Forged Indorsement.—At one time it was customary to draw bank checks payable to bearer. While this system prevailed banks were not troubled with questions as to liability in cases where checks bearing forged indorsements were presented and paid. But the custom has changed and now it is usual for the drawer to make his check payable to the order of a specified payee. This change in custom works for the benefit of the drawer of the check and throws upon the drawee bank an additional liability.

The implied contract between a bank and its depositor is that the bank will pay out the funds of the depositor only upon his order and in conformity with his directions. From this it follows that, when a bank pays a check drawn upon it, which bears a forged indorsement, it cannot charge the amount of the check against the depositor's account unless it can claim protection by reason of some principle of estoppel or by reason of some negligent act chargeable to the depositor. In general if the bank does charge the amount of such a check to the depositor it is liable to him in an action therefor. Thus a drawee bank is bound not only to know the signature of its depositor, but is also bound to know, or to ascertain at its peril, the genuineness of the indorsements upon the check.³⁶

36. *Russell v. First Nat. Bank, Ala.*, 56 So. Rep. 868; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. Rep. 1131; *Henderson Trust Co. v. Ragan*, 21 Ky. L. Rep. 601, 52 S. W. Rep. 848; *Winslow v. Everett Nat. Bank*, 171 Mass. 534, 51 N. E. Rep. 16; *Murphy v. Metropolitan Nat. Bank*, 191 Mass 159, 77 N. E. Rep. 693; *Lieber v. Fourth Nat. Bank, Mo.*, 117 S. W. Rep. 672; *Union Biscuit Co. v. Springfield Grocer Co.*, 143 Mo. App. 300, 126 S.W. Rep. 996; *Mechanics' Nat. Bank v. Harter*, 63 N. J. Law 578, 44 Atl. Rep. 715; *Pratt v. Union Nat. Bank*, 79 N. J. Law 117, 75 Atl. Rep. 313; *Kearny v. Metropolitan Trust Co.*, 110 N. Y. App. Div. 236, 97 N. Y. Supp. 274, *Aff'd.*, 186 N. Y. 611, 79 N. E. Rep. 1108, *Bank of British North America v. Merchants' Nat. Bank*, 91 N.Y. 106; *Welsh v. German-American Bank*, 73 N.Y. 424; *Shipman v. Bank of State of N. Y.*, 126 N. Y. 318; *Bloomingdale v. National Butchers' & Drovers' Bank*, 68 N. Y. Supp. 35, 33 Misc. Rep. (N. Y.) 594; *Adler v. Broadway Bank*, 30 Misc. Rep. (N. Y.) 383, 62 N.Y. Supp 402; *United Security Life Ins. & Trust Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. Rep. 97; *Califf v. First Nat. Bank*, 37 Pa. Super. Ct. 412; *Houser v. National Bank*, 27 Pa. Super. Ct. 613.

Where traveler's checks are lost by the person to whom they are issued, and are paid by the issuing bank on forged countersignatures of his name the bank is liable to the owner for amount. The relation between the

One ground upon which a bank is held liable, to its depositor in a case where it pays his check on a forged indorsement, is that it has the opportunity of investigating to find out whether the indorsements on the check are genuine before it makes payment. In theory the bank undoubtedly has this opportunity, but in practice it is an opportunity which a bank would find great inconvenience in taking advantage of. Another ground upon which this liability is based, and perhaps the more logical one, is that the forged indorsement gives the bank no title to the check and, therefore, gives it no right to charge the amount of the check against the drawer's account. Clearly it is impracticable for a bank to investigate every check presented to it for the purpose of finding out whether the indorsements which it carries are genuine. The bank, however, has one means of protection in these cases of forged indorsements and that is to see that checks are presented for payment by some bank or reliable person, with whom it is acquainted, and whose indorsement is a guaranty of the genuineness of prior indorsements.

Sometimes, though not very frequently, it happens that the drawer of a check is guilty of such negligence as to preclude him from holding the bank responsible for paying the check on a forged indorsement. Thus, where the drawer of a check, intended for a party in New York, mailed it to Cleveland by mistake, where it fell into the hands of another person having the same name as the payee, who indorsed it and collected the money, it was held that the loss was due to the negligence of the drawer and that the bank was not liable to him.³⁷ In considering this

parties is that of bank and depositor, and the situation the same as in the case of a check payable to a designated payee and unindorsed by him. The banker is entitled to recover in such a case from prior indorsers. In this case it was also held that the checks were not "lost" within the meaning of a provision of the agreement between the parties that the banker would refund the amount of the lost checks upon the execution of a suitable bond of indemnity. *Sullivan v. Knauth*, N. Y. App. Div., 146 N. Y. Supp. 583.

37. *Weisberger Co. v. Barberton Sav. Bank*, 84 Ohio 21, 95 N. E. Rep. 379. In this case the rule was applied that, where one of two innocent parties must suffer because of a fraud or forgery, justice imposes the burden upon him who is first at fault and put in operation the power which resulted in the fraud or forgery.

A depositor in a Milwaukee savings bank, being in Germany, wrote the bank asking that it remit by draft. The draft was sent but the post office delivered it to another party of the same name as the depositor, who col-

case it is to be observed that the fact that the wrongful indorsement was written on the check by a person who had the same name as the person, who was named in the check as payee, had nothing to do with the bank's liability. The bank was absolved from liability solely because of the fact that the drawer, by his own negligence, made the fraud possible. A signature, made with intent to defraud, by a person having the same name as the person to whom the check is payable, is just as much a forgery as it would be if the names of the parties were different.³⁸

No specific rule can be stated as to just what conduct on the part of the drawer of a check will constitute negligence sufficient to preclude him from holding a bank liable for paying his check upon a forged indorsement. There have been cases of checks paid on forged indorsements, where the fraud could have been avoided by sufficient caution on the part of the drawer and where the bank has nevertheless been held liable. Thus it was held that where a loan association issued checks payable to its members, upon forged withdrawal notices, although it had at hand the means of verifying the signatures, the bank was nevertheless liable to the association in paying the checks upon forged indorsements of the payees' names.³⁹

A decision of the Supreme Court of Alabama is interesting in connection with the payment of checks bearing forged indorsements. A person wishing to purchase a certain piece of timber land in Alabama went to the tax assessor in the town where the property was located and inquired as to who was the owner and whether the land was for sale. The assessor informed him that the property belonged to a party named Frank Framhold in Birmingham, Ala., and that it was for sale and could be purchased for \$640. The property really belonged to another Frank Framhold, who lived in Ohio, and was a nephew of the Frank

lected and appropriated the money. It was held that the bank was not liable to the depositor. The draft was sent pursuant to the depositor's instructions and he accepted the risk. *Jung v. Second Ward Savings Bank*, 55 Wis. 364.

38. *Russell v. First Nat. Bank, Ala.*, 56 So. Rep. 868; *Beattie v. National Bank of Illinois*, 174 Ill. 571, 51 N. E. Rep. 602; *Graves v. American Exch. Nat. Bank*, 17 N. Y. 205; *Heavey v. Commercial Nat. Bank of Ogden City*, 27 Utah 222, 75 Pac. Rep. 727; *Heim v. Neubert*, 48 Wash. 587, 94 Pac. Rep. 104; *Mead v. Young*, 4 T. R. (Eng.) 28.

39. *Harlem Coöperative Building & Loan Ass'n. v. Mercantile Trust Co.*, 10 Misc. Rep. (N. Y.) 680, 31 N. Y. Supp. 790.

Framhold in Birmingham. The investor agreed to purchase the property at the price named and the assessor prepared a forged deed to the land. The investor accepted the deed and delivered to the assessor his check on a local bank for \$640, payable to the order of Frank Framhold. This check was negotiated in Birmingham, Ala., and was subsequently paid by the drawee bank. What became of the proceeds does not appear except that none of the money ever reached the hands of the actual owner of the property. About a year later, the purchaser having been in possession of the property in the meantime, the owner appeared and the purchaser then found out for the first time that he had been defrauded. He thereupon brought action for the amount of the check against the bank on which the check was drawn, on the theory that the bank having paid the check on a forged indorsement could not rightfully charge the amount against his account. It was held that the bank was liable.⁴⁰

This case illustrates the burden which is thrown on the drawee bank by the rule that it must answer to its depositor for the amount of any check drawn by him and paid on a forged indorsement. The drawer of the check bought real estate from a person whom he had never seen and with whom he had never had any direct communication. In paying for the property he delivered his check to a person upon that person's representation that he was the agent of the owner. If any one connected with this transaction should have had his suspicions aroused it was the drawer of the check. The drawee bank had not the slightest reason to suspect that there had been any fraud in the transaction in which the check was given. There was no reasonable ground upon which it could start an investigation for the purpose of finding out whether or not the indorsements were genuine. And if it had started such an investigation it is doubtful whether it would have discovered the fraud. Nevertheless it had to

40. *Russell v. First National Bank, Ala.*, 56 So. Rep. 868. "We can see nothing in the facts of this case," said the court, "which takes it without the operation of the well-established rule that a banker on whom a check is drawn must ascertain, at his peril, the identity of the person named in it as payee; and we can see nothing from which a reasonable conclusion can be drawn that any bank connected with this transaction was misled by an act of negligence or other fault of appellant (drawer) justifying the mistake which was made in the payment of the check."

bear the loss. In this case the drawee was protected by the fact that it received the check from a bank in Birmingham, which had indorsed the check, guaranteeing prior indorsements. And this seems to be the only source of protection to a drawee bank in cases of this kind, that is to pay checks drawn upon it only when indorsed by some person or bank, whose indorsement insures it against loss.

A Kentucky decision, bearing on this situation, presents an interesting state of facts. One Oldham borrowed \$100 from the firm of Raggan and Tibbs. In payment of the loan he tendered a check on the Henderson Trust Co. for the amount, payable to the order of Tibbs. Tibbs refused to receive the check for the reason that it was written in lead pencil, and Oldham thereupon threw the check upon the floor without tearing or mutilating it. He then drew a new check in ink, which Tibbs accepted. Before Tibbs presented this check to the trust company the check written in lead pencil, which Oldham had thrown on the floor, was presented, bearing a forgery of Tibbs' indorsement and two other indorsements. The trust company paid it and, when Tibbs presented his check, there was not a sufficient sum on deposit to Oldham's credit to pay it. This action was brought by the firm against the trust company to recover on the check. Ordinarily the payee or other holder of a check cannot recover in an action thereon against the drawee bank unless the bank has accepted or certified the check. But, at the time this case was decided, under the law in Kentucky a check operated as an assignment and the holder was allowed to enforce it against the drawee bank, provided the bank had funds sufficient to pay it. In this case the bank claimed to be free from liability because of the fact that Oldham's account was not sufficient to pay the check. But the court held that the trust company, in paying the check bearing a forgery of Tibbs' indorsement, paid out its own money and not Oldham's and that the company was liable. The court said that, while Oldham was guilty of great negligence in throwing the check upon the floor, the trust company was also guilty of negligence in paying the check without investigating the genuineness of the indorsements on the check. It is difficult to conceive of a case where the drawer of a check could be more negligent. If it is not negligence for a person to deliberately throw his completed and signed check upon the floor, then there is hardly any length to which the

drawer may not go in dealing with his checks and feel that if any of them are fraudulently used the loss will be thrown upon the bank.⁴¹

In a case where the indorsement of the payee of a check was forged by the agent of the drawer, who collected the proceeds and paid them over to the drawer in settlement of a shortage in his accounts, it was held that, since the money came to the hands of the drawer, he had suffered no damage by reason of the payment and was not entitled to hold the bank liable.⁴²

Where the relation of banker and depositor does not exist the drawee bank is liable to the drawer for paying checks upon forged indorsements only where it has been guilty of negligence in so doing. In a case of this kind it appeared that it had been the practice of a certain company to authorize its agents to purchase corn from farmers and pay for the same by drawing checks in the name of the company upon a local bank. By an arrangement with the bank these checks were paid when presented and, when a number were accumulated, the bank would be reimbursed by a draft on the company for the total amount. One of the company's agents drew a number of such checks, forged the payee's indorsements and collected them at the bank on which they were drawn. The court held, that, inasmuch as the relationship of banker and depositor did not exist between the parties, the bank was entitled to recover from the company the amount of the fraudulent checks, the court saying in its opinion: "The bank's obligation under such circumstances was that simply of ordinary care and good faith. It had the right, in the absence of facts putting it upon notice, to rely upon Morlan's (the agent's) integrity. It was intrusted with no power to supervise or change his methods of transacting the business in hand, and, as has already been stated, there is no evidence impeaching the bank's good faith, or disclosing facts that ought to have put it upon its guard."⁴³

41. *Henderson Trust Co. v. Ragan*, 21 Ky. L. Rep. 601, 52 S. W. Rep. 848.

42. *Andrews v. Northwestern Nat. Bank*, Minn., 117 N. W. Rep. 780.

43. *Armour v. Greene County State Bank*, 112 Fed. Rep. 631.

Where the plaintiff made a deposit and directed the bank to pay it out on checks drawn by J., payable to certain persons, payment of the checks named on J's forged indorsement was held to be no defense to plaintiff's action against the bank to recover the deposit. "If the deposit be for a

The question of the duty of a depositor to examine his returned vouchers for forged indorsements, and the effect of his failure to discover indorsements which are not genuine or his neglect to notify the bank upon making such discovery are matters which will be taken up in subsequent sections.⁴⁴

§136. Right of True Owner against Drawee Bank where Check Paid on Forged Indorsement.—By the weight of authority it is held that, where a drawee bank pays a check upon a forgery of the payee's indorsement, it is responsible for the amount thereof to the payee, the rightful owner of the check.⁴⁵ Upon the drawee bank rests the burden of establishing the authority of a stranger to the check to indorse it for the payee, and the drawee must meet this obligation if it would escape the necessity of paying the check over again to the payee.⁴⁶

The payee's right to recover in such cases is placed upon the ground that the payment of the check by the drawee bank is equivalent to an acceptance or certification of the check.⁴⁷

In the case of *Commercial Nat. Bank v. Lincoln Fuel Co.*⁴⁸ it was said: "It being made to appear that the bank paid the check upon its presentment, after the unauthorized indorsement,

special purpose, under instructions, these instructions must be complied with by the bank. There may be a special deposit, so as to create a bailment, but that can have no application here. It is immaterial whether this deposit be treated as a general deposit or as a deposit for a special purpose other than bailment. The money was paid out precisely as the special instructions with the deposit provided, except that the signatures of the payees of the checks were forged. The principle seems to be well settled that a payment by a bank of a check to any person save the payee himself, except it be payable to bearer, is a payment at its peril." *Rice v. Citizens' Nat. Bank*, 21 Ky. Law Rep. 346, 51 S. W. Rep. 454.

44. See §147-152.

45. *Survey v. Wells, Fargo & Co.*, 5 Cal. 124; *Jackson Paper Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. Rep. 136; *Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App. 166; *McFadden v. Follrath*, Minn., 130 N. W. Rep. 542; *Thomas v. First Nat. Bank*, Miss., 58 So. Rep. 478; *Graves v. American Exchange Bank*, 17 N. Y. 205; *Dodge v. National Exchange Bank*, 20 Ohio St. 234; *Seventh Nat. Bank v. Cook*, 73 Pa. 483; *Pickle v. Muse*, 88 Tenn. 380; *Jackson v. Bank*, 92 Tenn. 154.

46. *Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App. 166.

47. *Commercial Nat. Bank v. Lincoln Fuel Co.*, 67 Ill. App. 166; *Seventh Nat. Bank v. Cook*, 73 Pa. 483; *Pickle v. People's Nat. Bank*, 88 Tenn. 380, 12 S. W. Rep. 919; *Jackson v. Bank*, 92 Tenn. 154.

48. 67 Ill. App. 166.

and charged the amount to the account of the drawer, who then had sufficient funds on deposit to meet it, and who afterward lifted the check in settlement with the bank, constituted sufficient proof of an acceptance of the check by the bank, in this suit brought by the payee against the bank."

It has been held that the payee of a check, paid by the drawee bank upon a forged indorsement, could recover from the bank in a case where the check was lost and the payee's indorsement forged by the finder,⁴⁹ or where the forgery was made by one having the same name as the true owner of the instrument,⁵⁰ or where the check was wrongfully indorsed by the agent of the payee.⁵¹

49. In *Survey v. Wells, Fargo & Co.*, 5 Cal. 124, it appeared that one Fenn being indebted to Survey, went to the defendant's express office in Nevada, purchased a check or draft drawn by Mulford, their agent, on the defendant at Sacramento, for \$715.00, enclosed it in a letter directed to plaintiff at Sacramento, and deposited it with defendant to deliver it. It was duly taken by the defendant to Sacramento, and a few days thereafter the plaintiff called at the defendant's office in Sacramento, and was told that there was no letter for him. It appears that a short time previously a person, who falsely represented himself to be the plaintiff, had presented the check, demanded the \$715.00 named therein, and received payment. The true owner then demanded the check, and also demanded payment thereon, which the defendant refused. It was held that the defendant was liable for the amount of the check.

50. *Thomas v. First Nat. Bank, Miss.*, 58 So. Rep. 478; *Graves v. American Exchange Bank*, 17 N. Y. 205.

51. In *Jackson Paper Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. Rep. 136, it appeared that an agent of the plaintiff company received a check payable to the company in settlement of an obligation due to the company. The agent without authority indorsed the check in the company's name and obtained the cash on it from a party to whom he was known, and who subsequently deposited and collected the check. It was held that the bank was liable for the amount of the check to the plaintiff company, whose name had been wrongfully indorsed on the check by the agent.

In *Seventh Nat. Bank v. Cook*, 73 Pa. 483, a check drawn by one Greenwood and payable to the order of Cook, given in payment of oil purchased by Greenwood from Cook, was delivered to Cook's agent. The agent acting without authority, indorsed the payee's name on the check and then his own name, and appropriated the proceeds to the payment of an amount due him by his employer. The payee refused to recognize the act of his clerk, obtained the cancelled check from the drawer, presented it to the drawee bank and upon being refused payment brought this suit. It was held that the plaintiff could recover.

Authority to an agent to collect does not authorize him to indorse checks

Some of the cases, which adhere to the above doctrine, it is to be noted, come from jurisdictions in which it is held that the owner of a check has no right therein which will entitle him to bring action thereon against the drawee bank, the ground being that there is no privity of contract between the holder of the check and the bank. If the bank refuses payment of the check the holder's only recourse is against the drawer or indorsers, and the bank is responsible, by reason of a wrongful refusal to honor a check, to the drawer only. These jurisdictions, while holding to the theory that the holder of a check cannot maintain an action on it against the drawee bank, lay down the rule that, when the check is paid by the drawee bank upon a forged indorsement, a right arises in favor of the holder against the bank. This conclusion, as stated above, is rested upon the theory that the payment of the check is equivalent to an acceptance or certification of the check.

This idea that the payment of a check upon a forged indorsement has the same legal effect as the acceptance of the check by the drawee bank, and renders it liable to the owner of the check in the same manner as if it had certified the check, has been refused recognition in a few well considered decisions.⁵²

In answer to the contention that the payment of a check and an acceptance or certification of it are the same in legal effect the Supreme Court of the United States has said: "This argument is based upon the erroneous assumption that the bank has paid this check. If this were true it would have discharged all of its duty, and there would be an end to the claim against it. The bank supposed that it had paid the check, but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee." And, in the same opinion, it was further written: "We cannot recognize the argu-

received. Where an agent wrongfully indorses checks payable to his principal and cashes them at the drawee bank, the bank is liable for the amount to the principal. *Graham v. United States Saving Institution*, 46 Mo. 186.

52. *First Nat. Bank v. Whitman*, 94 U.S. 343; *National Bank of Republic v. Millard*, 10 Wall. (U. S.) 152; *Rauch v. Bankers' Nat. Bank*, 143 Ill. App. 625; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. Rep. 1119; *J. M. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App. 132; *Howard H. Clarke & Co. v. Warren Savings Bank*, 31 Pa. Super. Ct. 647.

See also *Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank*, 220 Pa. 1, 69 Atl. Rep. 280, 15 L. R. A. (N. S.) 519.

ment that a payment of the amount of the check or sight draft under such circumstances amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act, the other an actual performance."⁵³

In an earlier decision of the Supreme Court it was suggested that there might be a recovery against a drawee bank by the owner of a check paid on a forged indorsement, where certain conditions were found to exist, the court saying: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex aequo et bono* would be applicable, as the bank, having assented to the order and communicated its assent to the paymaster (drawer), would be considered as holding the money appropriated for the plaintiff's use, and, therefore, under an implied promise to pay it on demand."⁵⁴

The conclusion that the payment of a check is not the equivalent of an acceptance or certification, and that the payee of a check, paid by the drawee bank upon a forged indorsement, cannot recover the amount of the check from the bank, has been placed upon the ground that an acceptance or certification, to be valid, must be in writing.⁵⁵ This provision, by virtue of the general adoption of the Negotiable Instruments Law, now exists in most of the states. The same conclusion has also been reached on the ground that the rule, which declares that a check does not operate as an assignment and does not give the holder any rights against the drawee bank, is applicable to these cases, and that the situation is not altered by the subsequent payment of the check upon a forged indorsement.⁵⁶

§137. Right of Drawee Bank to Recover Money Paid on Check Bearing Forged Indorsement.—When a bank pays a

53. First Nat. Bank v. Whitman, 94 U. S. 343.

54. National Bank of Republic v. Millard, 10 Wall. (U. S.) 152.

55. Rauch v. Bankers' Nat. Bank, 143 Ill. App. 625.

56. Howard H. Clarke & Co. v. Warren Savings Bank, 31 Pa. Super. Ct. 647; Lonier v. State Savings Bank, 149 Mich. 483, 112 N. W. Rep. 1119.

check drawn upon it by one of its depositors, and afterwards discovers that the payee's indorsement was a forgery, it may recover the money back from the party to whom the payment was made.⁵⁷ Unlike the case of the payment of a check bearing a forged signature, where it is generally held that the bank must know its depositor's signature and pays at its peril, the bank is not bound, so far as its right to recover back the money which it has paid on a forged indorsement is concerned, to know the payee's signature and is not under any obligation to ascertain whether the payee's indorsement is genuine before paying the check,⁵⁸ and the payment of the check is not an admission of the genuineness of the payee's indorsement.⁵⁹

Even in a case where the drawer makes the check payable to his own order, and it is indorsed in his name, an acceptance or payment of it by the drawee admits only the genuineness of the drawer's signature on the face of the check, and not the genuineness of his indorsement.⁶⁰ The bank may recover money paid on a check bearing a forged indorsement notwithstanding the fact that the drawer's signature is also a forgery.⁶¹ Such a

57. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; *Wellington Nat. Bank v. Robbins*, 71 Kans. 748; 81 Pac. Rep. 487; *Levy v. First Nat. Bank*, 27 Neb. 557, 43 N. W. Rep. 354; *First Nat. Bank v. Farmers' & Merchants' Bank*, 56 Neb. 149, 76 N. W. Rep. 430; *First Nat. Bank v. Omaha Nat. Bank*, 59 Neb. 192, 80 N. W. Rep. 810; *Harter v. Mechanic's Nat. Bank*, 63 N. J. Law 578, 44 Atl. Rep. 715; *Oriental Bank v. Gallo*, 112 N. Y. App. Div. 360, 98 N. Y. Supp. 561, Aff'd., 188 N. Y. 610, 81 N. E. Rep. 1170; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; *Central Nat. Bank v. North River Bank*, 44 Hun. (N.Y.) 114; *Muller v. National Bank of Cortland*, 96 N. Y. App. Div. 71, 89 N. Y. Supp. 62; *People's Bank v. Franklin Bank*, 88 Tenn. 299.

In *Second Nat. Bank v. Guarantee Trust & Safe Deposit Co.* 206 Pa. 616, 56 Atl. Rep. 72, a beneficial association drew a check on a bank payable to the order of a brother of the beneficiary. The brother's indorsement was forged and this was followed with other indorsements, the last being that of a trust company expressly guaranteeing all previous indorsements. It was held that the drawee bank could recover the money from the trust company, even though it appeared that the check was drawn without proper precaution, the beneficiary being still alive.

58. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74.

59. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296.

60. *Beeman v. Duck*, 11 Mees. & Wels. (Eng.) 251; *Williams v. Drexel*, 14 Ind. 566.

61. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296.

case does not come within the rule, which precludes a drawee bank from recovering the money it has paid on a check bearing a forged signature, but within the rule which permits the recovery of money paid on a forged indorsement.⁶²

The right of the drawee bank to recover the money it has paid on a check, the indorsement on which is forged, is placed upon the ground that the holder, by transferring the check, warrants that all prior indorsements are genuine,⁶³ and this is so whether the holder indorses the check or transfers it by delivery without indorsement.⁶⁴

As has been stated, a drawee bank is under no obligation, so far as the holder is concerned, to ascertain the genuineness of a payee's indorsement before paying a check, and its failure to discover such a forged indorsement promptly will not preclude it from recovering the money which it has paid out. In the *Case of Corn Exchange Bank v. Nassau Bank*,⁶⁵ it appeared that the plaintiff bank had paid to the defendant bank checks drawn on it, and that sixteen months later the plaintiff was notified by the drawer of the checks that the payees' indorsements were forgeries, whereupon the plaintiff notified the defendant of that fact. It was held that the plaintiff was not estopped by the delay from recovering.

But, while a drawee bank is not bound to discover a forged indorsement, it should give proper notice when it has in fact ascertained that it has made a payment on a forged indorsement. The same diligence in giving such a notice is not required as is called for in the giving of a notice of dishonor,⁶⁶ but the notice should be given within a reasonable time after the forgery is discovered.⁶⁷ As expressed in a New York decision, in point

62. *Farmers' Nat. Bank v. Farmers' & Traders' Bank, Ky.*, 166 S. W. Rep. 986.

63. *Wellington Nat. Bank v. Robbins*, 71 Kans. 748, 81 Pac. Rep. 487; *Central Nat. Bank v. North River Bank*, 44 Hun. (N. Y.) 114; *Oriental Bank v. Gallo*, 112 N. Y. App. Div. 360, 98 N. Y. Supp. 561, Aff'd., 188 N. Y. 610, 81 N. E. Rep. 1170; *People's Bank v. Franklin Bank*, 88 Tenn. 299.

64. *Wellington Nat. Bank v. Robbins*, 71 Kans. 748, 81 Pac. Rep. 487.

As to warranties of various kinds of indorsers and persons transferring by delivery without indorsement see Chapter V, Transfer of Checks, §44, 46, 50.

65. 91 N. Y. 74.

66. *Schroeder v. Harvey*, 75 Ill. 638.

67. *National Exchange Bank v. United States*, 151 Fed. Rep. 402.

with the question under discussion: "In cases where no negligence is imputable to the drawee in failing to detect the forgery, the want of notice within a reasonable time is excused, provided notice of the forgery is given as soon as it is discovered."⁶⁸

The case of *National Exchange Bank v. United States*,⁶⁹ was an action by the United States to recover money paid to the defendant bank on pension checks bearing forged indorsements. The case was submitted in all respects as though the instruments in question were bank checks and the litigation between private persons. It appeared that notice of the fact that the indorsements were forged was not given for some time, in some instances six months, after the discovery thereof by the United States. It was held that there could be no recovery under these circumstances, and this irrespective of whether it appeared that the defendant suffered any loss as a result of the delay; the court saying: "When discovered forgeries should not be coddled, but should be made known, both to the public prosecutor and to those immediately concerned, and any attempted test with reference to the question whether the party from whom recovery is sought has suffered by the delay is wholly unsatisfactory, because of the determination whether one who has suffered by a forgery may recoup himself is more a matter of chances, which cannot be estimated, than the result of logical investigation of particular facts."

Where a drawee bank has been sued by the payee of checks, which the bank paid on a forged indorsement, and held liable, it is limited, in an action against the party to whom the money was paid, to a recovery of the amount of the checks, with interest, and cannot recover the amount of costs and counsel fees which it incurred in defending the payee's action.⁷⁰ The same is true in a case where the drawee bank has been held liable at the instance of the depositor. In *Corn Exchange Bank v. Nassau Bank*⁷¹ the plaintiff bank, as drawee, had paid a check on which the indorsement of the payee had been forged. The depositor, whose money had thus been wrongfully paid out by the plaintiff, secured a judgment against the plaintiff for the amount paid out

68. *Bank of Commerce v. Union Bank*, 3 N. Y. 230, 237.

69. 151 Fed. Rep. 402.

70. *Muller v. National Bank of Cortland*, 96 N. Y. App. Div. 71, 89 N. Y. Supp. 62.

71. 91 N. Y. 74.

and costs. In an action by the plaintiff against the defendant bank, to which the payment had been made, brought upon the defendant's indorsement, made subsequent to the forged indorsement, it was held that the plaintiff might recover the amount of checks with interest, but could not recover the costs included in the judgment, which the plaintiff had paid to its depositor.

§138. Liability of Collecting Bank to Payee of Check Paid on Forged Indorsement.—It has generally been held that, where a bank receives a check for collection and, after the check has been collected and the proceeds paid over to the party from whom the check was received, it is discovered that the indorsement of the payee or other rightful holder of the check was forged, the collecting bank is liable to the true owner of the instrument. This conclusion is reached on the theory that the purchase of a check on a forged indorsement confers no title and, in contemplation of law, does not bring about a transfer of the check.⁷²

In *Buckley v. Second Nat. Bank*,⁷³ it was held that the payee named in a check, which was sent to his agent and by him

72. *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85; *Buckley v. Second Nat. Bank*, 35 N. J. Law 400; *Ellery v. People's Bank*, 114 N. Y. Supp. 108; *Salomon v. State Bank*, 28 Misc. Rep. 324, 59 N. Y. Supp. 407; *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295; *Pickle v. Muse*, 88 Tenn. 380, 12 S. W. Rep. 919; *Chism v. First Nat. Bank*, 96 Tenn. 641, 36 S. W. Rep. 387; *Farmer v. People's Bank*, 100 Tenn. 187, 47 S. W. Rep. 234.

Where one of two joint payees, named in a check, wrongfully indorsed the names of both, without the knowledge of the other, and delivered it to a bank for collection, which bank collected the check and turned the proceeds over to the party from whom the check was received, it was held that the bank was liable to the other payee in an action for conversion. *Kaufman v. State Savings Bank*, 151 Mich. 65, 114 N. W. Rep. 863.

The plaintiff, in the case of *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85, was a pensioner of the United States, his pension being payable at the pension office in Indianapolis. In March, 1880, there being due to the plaintiff the sum of \$582.20, the pension agent drew a check for that amount payable to the plaintiff's order, and sent it to him, by mail. The agent, however, by mistake addressed the check to "Plainfield, Ind.," instead of "Bloomfield, Ind.," where the plaintiff resided. The check was eventually delivered to another person whose name was the same as the plaintiff's and he wrongfully indorsed the check and collected the proceeds. It was held that, the plaintiff could recover the amount of the check from the bank to which it was wrongfully indorsed and which collected from the drawee.

73. 35 N. J. Law 400.

wrongfully indorsed and cashed at a bank, which thereafter collected it from the drawee, could recover the amount from the bank which cashed the check in an action for money had and received. It was likewise held in *Farmer v. Peoples' Bank*⁷⁴ that a bank, in which a check bearing a forgery of the payee's indorsement was deposited, and which collected the check and paid the proceeds to the depositor, was liable in an action by the payee. In *Salomon v. State Bank*⁷⁵ it was held that, where checks were deposited for collection in the defendant bank upon forged payees' indorsements, and collected by the defendant, and the drawers subsequently ratified the payments and cancelled the checks, the payees might, instead of suing the drawers, maintain an action against the defendant bank for the wrongful conversion of the checks.

The case of *Talbot v. Bank of Rochester*,⁷⁶ though it involved a certificate of deposit, is in point. It there appeared that the certificate was stolen from the mails and that, after the payee's indorsement was forged, it was deposited in the defendant bank and collected from the bank by which it was issued. It was held that the defendant was liable to the owner of the certificate.

There is at least one decision which, contrary to the general rule, holds that a bank which cashes a check drawn upon another bank, upon a forged indorsement of the payee's signature, is not liable to the payee.⁷⁷ In the decision referred to it appeared that the payee of the check in question had at one time kept an account in the defendant bank, but had withdrawn it. A bookkeeper in the employ of the payee forged the indorsement of the payee upon a check drawn upon another bank and had it cashed by the defendant, and the defendant in due course collected the check from the drawee. It was held that the money thus paid out by the drawee bank was its own, and not its depositor's, leaving the depositor's account intact and in no way affected by the payment, and that, while the payee still had a right of action against the drawer upon the original indebtedness, he had no claim against the defendant bank.

74. 100 Tenn. 187, 47 S. W. Rep. 234.

75. 28 Misc. Rep. (N. Y.) 324, 59 N. Y. Supp. 407.

76. 1 Hill (N. Y.) 295.

77. *Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank*, 220 Pa. 1, 69 Atl. Rep. 280, 15 L. R. A. (N. S.) 519.

§139. Liability of Collecting Bank where Check Collected on Unauthorized Indorsement.—In the matter of the liability of the collecting bank to the real owner of a check, there is no distinction between a check bearing an indorsement forged by a stranger to the transaction and a so-called unauthorized indorsement, such as one made by an agent in excess of his authority. In both cases the indorsement is wholly inoperative and confers no right to retain the instrument or the proceeds thereof, if collected.⁷⁸

So, where a trustee under a will appointed an agent to collect rents and the agent, without authority, indorsed and deposited to his personal credit in the defendant bank, a check payable to the order of the trustee which was collected and paid over to the agent, it was held, that the bank was liable to the trustee.⁷⁹ And where a bank allowed the president of a corporation to deposit to his personal credit, checks payable to the corporation, and to withdraw the proceeds, it was held liable to the corporation for the amount thus misappropriated by its president.⁸⁰

78. *Knoxville Water Co. v. East Tenn. Nat. Bank*, 123 Tenn. 364, 131 S. W. Rep. 447; *Deri v. Union Bank*, 65 Misc. Rep. (N. Y.) 531, 120 N. Y. Supp. 813; *Burstein v. People's Trust Co.*, 143 N. Y. App. Div. 165, 127 N. Y. Supp. 1092; *Schmidt v. Garfield Nat. Bank*, 64 Hun. 298, 19 N. Y. Supp. 252.

The Negotiable Instruments Law, Section 42 of the New York Act, provides as follows:—"Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

79. *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404.

As to the authority of an agent for collection to indorse, see §140.

80. *Niagara Woolen Co. v. Pacific Bank*, 141 N. Y. App. Div. 265, 126 N. Y. Supp. 890.

When an agent brings checks payable to his principal to a bank, indorses them in the name of his principal and requests the bank to place them to his individual credit, such transaction is so contrary to the usual course of business that the bank is thereby put upon notice. This is true whether the agent be president, manager, treasurer, or any other officer or agent of an employer corporation. A bank which receives checks under these circumstances cannot contend that the agent was acting within the apparent scope of his authority. *Knoxville Water Co. v. East Tenn. Nat. Bank*, 123 Tenn. 364, 131 S. W. Rep. 447.

It is apparent that danger attends the collection of checks by a bank where the payee's indorsement is a forgery. While the rule may seem harsh in some instances because of the impossibility of detecting a forged indorsement there is some justification for it, apart from the fact that a forged indorsement passes no title, at least in the case of a check payable to a corporation. It is customary for a corporation to at once deposit checks payable to it, which it receives in the course of business, and extremely unusual for it to use such checks in payment of its obligations. Therefore, when a bank receives for deposit a check, payable to a corporation, to the credit of some one other than the corporation, it has notice from the form of the check that there may be something wrong with the transaction. And, unless it is satisfied from other circumstances that the transaction is regular, it should, for its own protection, make inquiries as to how the check came to the possession of the party offering it for deposit. When the check is payable to an individual the bank is not put upon notice to the same extent. But the rule is the same, and if a bank, in such a case, collects a check bearing a forged indorsement, it is in general liable to the true owner of the instrument. Further illustrations of the working of this rule will be found in the following section.

§140. Agent's Authority to Indorse.—The rights of parties to a check, which is claimed to have been wrongfully indorsed by an agent, frequently depend upon the agent's authority to make the indorsement in the name of his principal. There is no doubt that an agent, properly authorized, may indorse in behalf of his principal and bind the principal thereon to the same extent as if the indorsement had been made by the principal himself. Authority to indorse need not be expressly conferred upon the agent but may be implied from circumstances connected with his agency, and authority to indorse may be given to an agent verbally as well as in writing.⁸¹

Bankers are frequently requested by traveling salesman or other agents representing business houses, to pay a check drawn on their bank or to cash one drawn on a neighboring bank, payable to the order of the principal. The agent is usually able to show that he has authority to sell goods and to collect bills owing

81. *Brown v. Bookstaver*, 141 Ill. 461.

to his principal. From this the banker is liable to draw the inference that the agent has authority to indorse checks payable to his principal and may pay the check in reliance upon such implied authority. In paying a check under such circumstances, the bank assumes the risk of the agent's authority. If the agent has authority to indorse, the bank is protected; but if he has no such authority and the proceeds of the check are not turned over to the principal, then the bank must bear the loss. No matter how plausibly it may be argued that authority in an agent to collect carries with it authority to indorse checks payable to the principal's order, received by the agent, such is not the law. The courts uniformly hold that an agent, authorized to collect cash and checks from debtors of his principal, does not by virtue of such authority gain the right to indorse for negotiation checks drawn to the principal's order.

Consequently, where an agent, having authority to collect money owing to his principal, but no express authority to indorse checks received in the course of his employment, wrongfully indorses a check payable to his principal and obtains money on it from the drawee bank, or some other bank, or negotiates it for value to some purchaser, and uses the proceeds for his own personal benefit, the bank or person taking the check is responsible for the amount to the principal, the rightful owner of the check.⁸²

82. *Robinson v. Bank of Winslow, Ind.*, 85 N. E. Rep. 793; *Hamilton Nat. Bank v. Nye*, 37 Ind. App. 464, 77 N. E. Rep. 295; *Graham v. United States Sav. Inst.*, 46 Mo. 186, *McFadden v. Follrath*, Minn., 130 N. W. Rep. 542; *Adler v. Broadway Bank*, 62 N. Y. Supp. 402, 30 Misc. Rep. (N. Y.) 382; *Jacoby v. Payson*, 85 Hun. (N. Y.) 367; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Thompson v. Bank*, 82 N. Y. 1; *Jackson v. National Bank*, 92 Tenn. 154, 20 S. W. Rep. 802.

In *Graham v. United States Sav. Inst.*, 46 Mo. 186, an agent was authorized to collect certain bills. He received checks, payable to his principal's order, which he indorsed in the principal's name and received payment from the bank upon which the checks were drawn, which money he misappropriated. The Court held the bank liable, saying: "The agent's primary duty was to collect the bills, not the checks given in adjustment of the bills. The main purpose had been accomplished when he had received the checks payable to his principal. His duties as a collector ceased at that point. His next duty was to account to his employers for the proceeds of his collections and turn over the checks to them, to be disposed of as they might adjudge proper. The indorsement of the checks was no necessary incident of the collection of the accounts."

In *Jackson v. National Bank of McMinnville*, 92 Tenn. 154, 20 S. W.

A distinction is to be noted between cases wherein the indorsement is entirely unauthorized and, therefore, a forgery, and cases in which the indorsement is authorized, but a wrongful use of the check is made by the agent. In some of the cases it appears that the principal has authorized his agent to indorse "for deposit" checks payable to the principal. If the authority conferred upon the agent specifies an indorsement in such form that the check when indorsed by the agent in accordance with his authority can be used for no other purpose than a deposit, then an indorsement in blank by the agent is a forgery and does not transfer title to the check. Where a clerk, authorized to indorse checks "for deposit" with a rubber stamp, wrongfully indorsed certain checks in blank and deposited them to his own credit in the defendant bank, afterwards drawing out and using the proceeds, it was held that the defendant was liable to the principal.⁸³

Where, however, the agent is authorized to indorse checks in blank for the purpose of depositing them to the credit of the

Rep. 802, it was said: "A drummer or commercial traveler, employed to sell and take orders for goods to collect accounts, and receive money and checks payable to the order of his principal, is not by implication authorized to indorse such principal's name to such checks. No equitable consideration can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages, and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security."

83. *Schmidt v. Garfield Bank*, 64 Hun. (N.Y.) 298, Aff'd. 138 N.Y. 631.

In *Rosenberg v. Germania Bank*, 44 Misc. Rep. (N. Y.) 233, 88 N. Y. Supp. 952, the plaintiff had authorized his bookkeeper to indorse for deposit in a particular bank checks payable to the plaintiff, using for that purpose a rubber stamp. The bookkeeper wrongfully indorsed in blank a number of checks payable to the plaintiff and obtained cash on them from a saloon keeper, who deposited them in the defendant bank, which collected them in regular course. It was held that the collecting bank was liable to the plaintiff for conversion of the checks, and that the plaintiff was not estopped from denying the agent's authority to indorse by the fact that the agent was authorized to indorse for deposit by rubber stamp, nor by the fact that the bookkeeper had cashed other checks bearing the genuine indorsement of the plaintiff. "The determination of this appeal," said the court, "will establish no novel precedent, but, were that so to be the court would need more than herein appears to determine that whenever a man, because of insufficient schooling, occupation in his workshop, or other cause, employs a bookkeeper to do his countinghouse work, he there-

principal, or where he is authorized to indorse for that purpose, and his authority is not limited by any restriction as to the form of the indorsement, his indorsement in blank will transfer good title to one who takes the checks without notice that he is authorized to indorse for deposit only. Where a check is indorsed under such circumstances and the proceeds appropriated by the agent, the principal has no cause of action against the drawee bank or against the party to whom the agent negotiated the check, where such parties acted in good faith.⁸⁴

This rule is illustrated in a New York decision where it appeared that a firm in Paris had authorized its agent in New York to indorse for deposit in a particular bank all checks received by him payable to the firm. No restriction was placed upon the agent as to the form of the indorsement. He indorsed several checks payable to the firm and delivered them to a stockbroker for his private speculative account. The broker indorsed them and deposited them in the defendant bank, by which they were collected and paid over to the broker. It was held that inasmuch as the agent was authorized to indorse the firm's checks, his subsequent wrongful diversion of them did not make the original indorsement a forgery, and since the bank had no notice of the fraud and obtained good title to the checks, it was not liable to the payee firm.⁸⁵ And, where an attorney,

by exposes himself to such disposition of his funds as his bookkeeper may make under what a bartender or bartenders consider the bookkeeper's authority."

Authority to a clerk to indorse checks for certain business purposes does not authorize him to indorse for his own use. Where a clerk so authorized, indorsed checks payable to his principal and appropriated the proceeds, it was held that the indorsements were forgeries and that the drawee bank was liable to the drawer. *Citizens' Nat. Bank v. Importers' & Traders' Bank*, 49 Hun. (N. Y.) 607, 1 N. Y. Supp. 664.

But see the case of *Standard Steam Specialty Co. v. Corn Exchange Bank*, 148 N. Y. Supp. 549, where an agent authorized to indorse in a particular form for deposit, indorsed in blank checks payable to the principal and had them cashed by persons who deposited them in the defendant bank. The defendant was held not liable to the principal on the authority of the *Salen* case, cited in footnote 85, notwithstanding the fact that the indorsements were clearly forgeries.

84. *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182, 73 Pac. Rep. 873; *Cluett v. Couture*, 140 N. Y. App. Div. 830, 125 N. Y. Supp. 813.

85. *Salen v. Bank of the State of New York*, 110 N. Y. App. Div. 636, 97 N. Y. Supp. 361.

expressly authorized to indorse in blank checks payable to a client, indorsed certain of his client's checks, deposited them in his personal account and misappropriated the proceeds, it was held, that the collecting bank was not liable to the client.⁸⁶

To be protected in collecting a check indorsed by an agent in his principal's name, the bank need not have actual notice of the agent's authority to indorse at the time of the deposit. It is entitled to the benefit of any facts which inquiries as to his authority would have elicited. Thus, where an agent of a firm indorsed and deposited in his private account, a check payable to the order of the firm, afterwards misappropriating the proceeds, it was held that the bank was not liable to the firm, it appearing that if inquiry as to the agent's authority had been made, facts would have been disclosed which would have justified the bank in believing that the agent was acting within his authority.⁸⁷

Authority on the part of an agent may be implied from a previous course of dealing whereby the principal has recognized, or by inaction, affirmed such authority on the part of the agent.⁸⁸ But where a party accepting a check indorsed by an agent maintains that the agent had apparent authority to make such indorsement by reason of previous course of dealing, he must prove that the facts giving color of authority to the agent were known to him. If he had no knowledge of such facts, he could not act in reliance upon them and therefore is not in a position to claim anything by reason of such apparent authority.⁸⁹

An agent may have implied power to indorse checks in the name of his principal where the authority to indorse is a necessary implication from an express authority conferred upon the

86. *Mills v. Nassau Bank*, 52 Misc. Rep. 243, 102 N.Y. Supp. 1119. In this case the court said that the application which the agent made of the funds thus placed to his credit was of no more concern to the bank than would be the disposition of cash which he might have received for the check under the authority given him.

87. *Buckley v. Lincoln Trust Co.*, 72 Misc. Rep. 218, 131 N. Y. Supp. 105.

88. *Exchange Bank v. Thrower*, 118 Ga. 433, 45 S. E. Rep. 316; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N.E. Rep. 136; *Best v. Krey*, 83 Minn. 32, 85 N. W. Rep. 822.

89. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. Rep. 136.

agent, and where the duties to be performed by the agent cannot be discharged without the exercise of such power of indorsement.⁹⁰ Authority to indorse, however, will not be implied from the fact that an agent is the general manager of the principal's business. Where a general manager, without express authority, indorsed a check payable to his principal and negotiated it to one who collected it from the drawee bank, appropriating the proceeds to his own use, it was held that the drawee bank was liable to the principal.⁹¹

§141. Right of True Owner of Check to Recover from Purchaser Where Indorsement Forged.—The ordinary purchaser of a check stands in the same position as does the collecting bank, when he receives the check under a forged indorsement; that is to say, a person who receives a check on which the payee's indorsement is forged, though he takes the check without notice of irregularity and gives value therefor, is answerable for the amount of the check in an action by the payee. In an instance of this kind the bookkeeper of the plaintiffs, who were wholesale merchants, forged the indorsements on checks which were payable to the plaintiffs and delivered them for value to the defendant, who thereafter collected them from the banks on which they were drawn. It was held that the defendant was liable in an action by the plaintiffs; the forged indorsements were nullities and the defendant could not successfully resist the title of the true owners of the checks.⁹²

Where an agent having written authority to collect money owing to his principal, but no authority to indorse paper in his

90. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. Rep. 136.

91. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. Rep. 136.

92. *Meyer v. Rosenheim & Co.*, 24 Ky. L. Rep. 2314, 73 S.W. Rep. 1129.

In *A. Blum Jr.'s Sons v. Whipple*, 194 Mass. 253, 80 N. E. Rep. 501, the plaintiff, a corporation engaged in the wholesale liquor business, had an agent, who indorsed without authority a check payable to the corporation and persuaded the defendant to cash it. It was held that the defendant was liable to the corporation for the amount of the check.

Where a check, payable to the plaintiff, was stolen from him while he slept, indorsed with his name and negotiated, it was held that the plaintiff could recover the amount from a bona fide purchaser of the check. *Warren v. Smith*, Utah, 100 Pac. Rep. 1069.

principal's name, wrongfully indorsed a check payable to the principal's order and negotiated it in settlement of his private debt, smaller than the amount of the check, taking the creditor's check for the balance which he collected, it was held that the principal could recover from the person to whom the agent negotiated the check.⁹³

§142. Forged Indorsement where Check Delivered to Impersonator.—The general rule in regard to the liability of a bank, which pays a check upon a forgery of the payee's indorsement, has previously been expressed. Its effect is that the drawee bank, in such a case, pays at its peril and cannot charge against the account of the drawer the amount of a check, which it has paid. There is an interesting line of decisions which apparently constitutes an exception to this rule. At least these decisions present an exception to the extent that they hold that the drawee bank is not liable to the drawer, where, under certain circumstances, it has paid a check of the drawer, although it appears that the check was not indorsed by the person named as payee in the check, nor by his authority. With slight variations the facts which these decisions involve are as follows: A, an impostor, and usually a stranger in the community, represents that he is B, and in that role obtains by fraud a check from C payable to B or his order. C, the drawer, is generally aware of the fact that there is such a person as B, but does not know him personally. After obtaining the check A wrongfully places B's indorsement upon the check and collects the amount from the bank on which it is drawn. Then the question arises as to whether the drawee bank or the depositor should stand the loss. By the weight of authority it is held that the indorsement of the check by the impersonator, in the name which he has assumed for the purposes of fraud in such a case, is not a forgery and that the drawee bank is protected in paying.⁹⁴ There is no forgery in these cases for the reason that the drawer of the check intends

93. *Jacoby v. Payson*, 85 Hun. (N. Y.) 367.

94. *United States v. National Exchange Bank*, 45 Fed. Rep. 163; *Hoge v. First National Bank*, 18 Ill. App. 501; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322; *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354, 61 N. E. Rep. 596; *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360; *Sherman v. Corn Exchange Bank*, 91 N. Y. App. Div. 84, 86 N. Y. Supp. 341; *McHenry v. Old Citizens' Nat. Bank, Ohio*, 97 N. E. Rep. 395.

it to be indorsed and negotiated by the person with whom he deals and to whom he delivers the check.

If it appears, however, that the drawer of a check does not deal with the impostor in the full belief that he is dealing with the real person named as payee in the check, but leaves it to the drawee bank to determine whether or not payment is made to the correct party, then indorsement by the impostor is a forgery and the drawee bank is not protected in making such payment.⁹⁵

One scheme, which seems to have found popularity among those who perpetrate frauds of this character, is to assume the name of a person who owns real property in a place distant from the scene of action, and to apply for a loan of money upon the security of the property. If the lender, after satisfying himself as to the validity of the security, pays the money to the impersonator in the form of a check, the latter is generally able without great difficulty to identify himself as the payee named in the check and collect thereon. This device was resorted to in the case of *Meyer v. Indiana National Bank*,⁹⁶ where the court, in

95. In *Dodge v. National Exch. Bank*, 30 Ohio St. 1, a government certificate of indebtedness payable to F. D. Dodge was stolen and presented by the thief claiming to be Dodge. A check payable to the order of Dodge, was delivered to the thief on the assurance that he would identify himself as Dodge at the drawee bank. He succeeded in doing this and collected the check. It was here held that the drawee bank was liable to the payee named in the certificate and check after having paid the check on a forged indorsement. It could not be claimed in this case that the check was paid to the person to whom the drawer intended it to be paid. The intention was to order payment to Dodge and it was left to the bank to identify the holder of the check as Dodge.

96. *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354, 61 N. E. Rep. 596.

Liability of Collecting Bank. A posing as B's brother, had a lawyer write to B for money, which B sent in the form of bank drafts. A indorsed the drafts to the C bank, which collected them. Held that B could not recover from C bank. *Maloney v. Clark*, 6 Kans. 82.

The disbursing agent for the executor of an estate held a distributive share for one Peter W. Brubaker. He entered into correspondence with an impostor at Lincoln, Neb., signing himself Peter W. Brubaker, in belief that he was the person entitled to the money and finally purchased a bank draft, payable to Peter W. Brubaker and mailed to the impostor at Lincoln, Neb. Defendant bank purchased the draft, on indorsement by the latter as Peter W. Brubaker and collected it. Held: The purchasing bank acquired good title to the draft and was not accountable for its proceeds to the disbursing agent who indorsed it to Brubaker. *Hoffman v. American Exch. Nat. Bank*, 2 Neb. (Unoff.) 217, 222, 96 N. W. Rep. 112

holding that the drawee bank was not responsible to the drawers for the amount of the check, which it paid upon an indorsement by the impersonator, said: "The person to whom appellants (drawers) ordered their funds to be paid was the one to whom they were paid. They were deceived as to his true name. They were mistaken as to his ownership of property and character. He obtained the check by gross fraud, but he had the right to payment as between himself and the bank, it having no notice of or part in the fraud, or the transaction in which it was practised."

As expressed in *Meridian National Bank v. First National Bank*,⁹⁷ where one who had stolen certain cattle assumed the name of W. C. Smith, and sold the cattle, receiving therefor a check payable to the order of W. C. Smith, which he indorsed and collected: "The check was received by the identical person or individual to whom its drawer intended to deliver it, and was by that person indorsed in the name in which it was issued to him. Even the drawer did not have in mind as the payee any other or different individual."

These decisions also apply the rule that, where one of two innocent persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence and commits the first oversight must bear the loss, and hold that, under this rule, the drawer of a check delivered to an impersonator is estopped by his own lack of caution to demand payment of the drawee bank, when the latter has paid out the drawer's money on the impersonator's indorsement.⁹⁸

97. *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322.

In *Robertson v. Coleman*, 141 Mass. 231, it was said: "The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name. The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, and whose name they believed to be Charles Barney, thereby intending the person to whom they gave the check."

98. *McHenry v. Old Citizens' Nat. Bank, Ohio*, 97 N. E. Rep. 395.

United States v. National Exchange Bank, 45 Fed. Rep. 163. In this case, where a post office official delivered a check to one who presented an order for money, and succeeded in passing himself off as the payee named in the order, the court, in holding that the drawee bank was not liable to the United States for the amount of the check which it subsequently paid, after having the holder satisfactorily identified, said: "Allowing the drawer and drawee to be equally innocent, the loss should fall upon that one who, by his act, has been the occasion of the loss."

The fact that the imposition is accomplished by correspondence and that the drawer of the check does not meet the perpetrator of the fraud face to face does not remove the case from the application of the principles above set forth. In one such instance the executor of an estate received letters purporting to be written by a legatee named in the will. As a matter of fact the legatee, who, it seems, was the sister of the executor, was dead, the executor being ignorant of this fact, and the letters were written by her husband. In the letters a payment of the legacy was demanded and the executor purchased a draft from the defendant bank, payable to the order of the legatee, which he forwarded in a letter addressed to the legatee. The husband forged her indorsement and obtained the money. It was held that the executor was not entitled, under these circumstances, to recover from the defendant bank.⁹⁹

In the case of *Emporia National Bank v. Shotwell*¹⁰⁰ a person assumed the name of another party who owned certain land and applied to the plaintiff by letter for a loan, offering the land as security. The plaintiff purchased a draft upon the defendant bank, payable to the order of the person in whose name the application was made, and forwarded it. The draft was subsequently paid upon an indorsement by the impersonator and it was held that the drawee bank was not liable to the plaintiff. It has also been held in a case, involving similar facts, except that the application was made by a person who actually bore the same name as the person he represented himself to be, that,

99. *States v. First Nat. Bank*, 17 Pa. Super. Ct. 256; In the opinion it was said: "It is to be observed that the case before us is not that of a lost check or draft upon which payment has been secured on a forged indorsement. The draft in this case was forwarded by the plaintiff to one who was impersonating the plaintiff's dead sister. It was an imposition perpetrated by correspondence. The plaintiff, in fact dealt with the husband of the deceased, Rebecca Vincent. To the husband the draft was sent by the plaintiff. By the impersonator, or by his direction, the draft was indorsed with the name of Rebecca Vincent. The payment was thus made to the identical person to whom the draft was sent by the plaintiff. The loss to the plaintiff in this case is the result of the deception practiced upon him. To allow him now to recover from the bank would be to shift the responsibility for failing to discover the deception, from the plaintiff to the bank from whom he bought the draft; to throw upon the bank the risk of an antecedent fraud practiced upon the purchaser of the draft of which the bank had neither knowledge nor means of knowledge."

100. *Emporia Nat. Bank v. Shotwell*, 35 Kans. 360.

where the lender forwarded a draft, which was collected by the impersonator, the drawee bank was not liable to the lender.¹

Under the rule that, where a person draws his check and delivers it to an impostor, believing him to be the payee named in the check, the indorsement of the check by such impostor does not constitute a forgery, it is held that a drawee bank, having paid a check under such circumstances to a bank which innocently handled the check for collection, cannot recover the money thus paid.²

These authorities, however, have been criticized by at least one court. The Supreme Court of Rhode Island expresses itself in the following language: "These cases lose sight of the distinction between real and fictitious persons. In the latter case there is nobody to inquire about; no one, in fact, misrepresented; no one in the mind of one party other than the person with whom he is dealing. In the case of a real person, however, one party, having him in mind, satisfies himself about the responsibility of such party and supposes that he is dealing, not with the person who is in fact before him, but with the one whom he has in mind and whom the one before him falsely personates."³ In the Rhode Island case referred to it appeared that one Potter, representing himself to be Haskell, applied to Tolman for a loan, giving Haskell's residence and occupation as his own. Tolman, after making inquiries, gave Potter a check payable to the order of Haskell, which Potter indorsed and cashed. In holding that the drawee bank was liable to Tolman, the drawer, the court relied upon the Negotiable Instruments Law and stated in the opinion: "The signature in this case is clearly one 'made without the authority of the person whose signature it purports to be,' and, therefore, it is 'wholly inoperative.' This being so, the defendant cannot justify its action under it, there being no evidence of any conduct by the plaintiff to mislead the defendant and so estop his present claim. As the case stood, the plaintiff had ordered the money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon

1. Hoge v. First Nat. Bank, 18 Ill. App. 501.

2. Land Title & Trust Company v. Northwestern Nat. Bank, 196 Pa. 230, 46 Atl. Rep. 420.

3. Tolman v. American Nat. Bank, 22 R. I. 462, 48 Atl. Rep. 480.

did not relieve the bank from its duty to see that the money was paid according to order."⁴

§143. Forged Indorsement where Check Delivered to One Wrongfully Assuming Authority as Agent.—The general rule as to checks wrongfully indorsed by impostors, referred to in the preceding section, does not apply where the impostor, instead of claiming to be another individual, merely assumes to be the agent of some one else, whom he does not in fact represent. While, in delivering a check to such a person, the drawer may be considered as vouching for him as the agent of the payee, he does not vouch for his right or authority to indorse the payee's name. In these cases the check is made payable to one person and delivered to another for the payee. The drawer has no illusions in regard to the person with whom he deals except upon the point of his authority to act as agent. He does not believe that he is making his check payable to the person to whom he delivers it, nor that it is to be indorsed and negotiated by that person. And inasmuch as the person to whom the check is delivered has no authority to act for the payee his indorsement is a forgery. The payment of the check by the drawee bank is unauthorized and it must make good the amount of the check to the drawer under the general rule as to payments upon forged indorsements.⁵

4. The Negotiable Instruments Law (Sec. 42 of the N. Y. Act) provides that "where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

5. *Russell v. First Nat. Bank, Ala.*, 56 So. Rep. 868; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 7 S. E. Rep. 738, 2 L.R. A. 96; *German Savings Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 70 N. W. Rep. 769; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. Rep. 693; *Goodfellow v. First Nat. Bank, Wash.*, 129 Pac. Rep. 90.

In *Armstrong v. Pomeroy National Bank*, 46 Ohio St. 512, 22 N. E. Rep. 866, the facts showed that a person named Grimes represented himself to be the agent of one Brown, a fictitious person, in the negotiation of a note. The plaintiff gave Grimes a check on the defendant bank, which Grimes indorsed and collected. It was held that the indorsement was a forgery and that the defendant bank was liable to the plaintiff. In the opinion, written by the court, it was said: "If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such

It would seem that cases of this kind might be proper ones in which to apply the rule that, where one of two innocent persons must suffer a loss, the loss should be thrown upon that one who has, by his act occasioned the loss. The drawer of the check has an opportunity before delivering the check to investigate the agency of the individual with whom he deals, and a reasonable investigation would, in most instances, lead to a disclosure of facts which would cause the drawer to withhold his check and prevent the perpetration of the fraud. The bank, on the other hand, is unaware of the circumstances under which the check was given and has neither reason nor opportunity for looking into the matter of whether or not the indorsement of the payee's name is genuine. Probably the best answer to this contention is that the authorities, almost without exception, hold that the drawee bank which pays a check under such circumstances is responsible for the amount to the drawer.

§144. Rights of Holder of Check Delivered to Impersonator.—

Under the rule that, where a person draws a check and delivers it to an impostor, believing him to be the payee named in the check, the indorsement of the check by such impostor does not constitute a forgery, it is held that the drawer in such case is liable to any bona fide holder of the check to whom it is subsequently indorsed for value.⁶

a person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions, than if it had been made payable to a real person; in other words why he should not be required to use the same precautions in the one case as in the other; that is, determine whether the indorsement is genuine or not."

6. *Robertson v. Coleman*, 141 Mass. 231; *Burrows v. Western Union Tel. Co.*, 86 Minn. 490, 90 N.W. Rep. 1111; *First Nat. Bank v. American Exchange Nat. Bank*, 49 N. Y. App. Div. 349, 63 N. Y. Supp. 58, Aff'd., 170 N. Y. 88, 62 N. E. Rep. 1089; *Gallo v. Brooklyn Savings Bank*, 129 N. Y. App. Div. 698, 114 N. Y. Supp. 78; *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. Rep. 165.

Contra, *Palm v. Watt*, 7 Hun. (N.Y.) 317, where a person assumed the name of one Gillespie and wrote to Gillespie's family for funds, which were forwarded in the form of a bank draft, purchased from and drawn by the defendant, a banker. It was held that the defendant was not liable to an innocent purchaser of the check, first because the indorsement was a forgery and, second, because the defendant remained liable to the real payee of the check.

Robertson v. Coleman⁷ is a frequently cited authority on this question. It there appeared that a thief, who had stolen a pair of horses, registered at a Boston hotel under the assumed name of Charles Barney. He gave that name to certain auctioneers in the city and requested them to sell the horses for him. There was living at Swanzey, Mass., at the time, a reliable and responsible man named Charles Barney, and the auctioneers believed the impostor to be that person. They paid the proceeds of the sale by a check, drawn to the order of Charles Barney, and this the impostor indorsed and transferred for value. The auctioneers learned the true facts before the check was presented and stopped payment, but it was held that the indorsee could recover in an action brought against them.

§145. Liability of Bank Where it Pays Check on Forged Indorsement of Name of Fictitious Payee.—Where a check is payable to the order of a fictitious or non-existing person, and this fact was known to the person who signed the check, the check is deemed to be payable to bearer.⁸ Although such a check apparently requires an indorsement in order to transfer it, it is in reality transferrable without indorsement just as though it were actually made payable to bearer. Consequently, if a check of this kind is indorsed with the payee's name, the indorsement is immaterial and cannot be regarded as a forgery, and, if the drawee bank pays the check, it is not responsible to its depositor for the amount as it would be in the ordinary case of paying a check bearing a forged indorsement.⁹

A check may be regarded as payable to a fictitious person, and therefore payable to bearer, though it names as payee an actually existing person. This happens when the person drawing the check to the order of an existing person does so for his own purposes and intends that the payee shall have no interest whatever in the check. The check is in effect payable to a non-entity.¹⁰

In one instance the plaintiff's clerk, who was authorized to

7. 141 Mass. 231.

8. N. Y. Neg. Inst. Law, §28.

9. Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. Rep. 982, 23 L. R. A. 584.

10. Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. Rep. 982, 23 L. R. A. 584.

draw checks against the plaintiff's account in the defendant bank, drew four checks to the order of a certain individual, forged the indorsements on the checks and negotiated them. The clerk drew the checks for the sole purpose of defrauding his employer; he knew that the payee named in the checks would never acquire any interest in them or their proceeds and that the checks would never come to his hands. Under the rule stated it was held that the checks were payable to bearer and that the bank was not liable to the plaintiff as having paid out his money on checks bearing forged indorsements. In contemplation of law the checks were transferrable by delivery, and might have been paid by the bank without any indorsement whatever; the situation was the same as though the clerk had made the checks payable to bearer and had obtained the money on them from the bank.¹¹

In another case the clerk of the plaintiff, by fraudulently representing to him that certain persons had applied for loans, procured from the plaintiff a number of checks payable to the orders of such persons. On some of the checks the payee named was a purely fictitious person, while the payees of others were actually existing persons. The clerk forged the indorsements of the various payees and collected on the checks. It was held that the bank was liable to the plaintiff, its depositor, in that it had paid out his money on checks bearing forged indorsements.¹²

The distinction between these two cases is clear; in the first case, the person who drew the checks, that is the clerk, knew that the payee named in the checks would never receive them nor acquire any interest in them. Consequently the checks were in effect payable to bearer and capable of being transferred without any indorsement whatever. In the second case, the person who signed the checks, that is the depositor, believed in each instance that the payee was a real person, without whose valid indorsement the check could not be transferred or collected. Since the drawer was ignorant of the manner in which these checks in the second case were to be used, the checks could not be considered as payable to bearer within the rule already stated. Not being payable to bearer, the checks could not be transferred without a valid indorsement, and any indorsement of the

11. *Snyder v. Corn Exchange Bank*, 221 Pa. 599, 70 Atl. Rep. 876.

12. *Shipman v. Bank*, 126 N. Y. 318.

payee's name, made without authority would constitute a forgery.¹³

§146. Right of Bank to Recover Money Paid on Forged Indorsement of Name of Fictitious Payee.—The same reasoning set forth in the foregoing section is applied when a bank attempts to recover back the money, which it has paid out on a check payable to a fictitious or non-existing person, and bearing an unauthorized indorsement.

If the person signing the check knew that it was payable to a fictitious or non-existing person, then the check is regarded as being payable to bearer, and the bank is not permitted to recover the money from the innocent holder to whom it was paid, notwithstanding the wrongful indorsement.

In a New York case the following facts were involved. A person forged the signature of an administrator to a number of checks, drawn upon the plaintiff trust company. The names of persons entitled to a distributive share in the estate represented by the administrator were filled in as payees, and their indorsements were forged. The checks were deposited in the defendant bank, collected and paid over to the forger. The plaintiff could not, of course, repudiate the signatures on the checks, but it was contended that the plaintiff could recover the amounts of the checks as money paid on forged indorsements. It was clear that the forger, who signed the checks, never intended that the persons named as payees should have any interest in the checks. It was held, therefore, that the checks were, in effect, payable to bearer, that the defendant bank got good title to them irrespective of the indorsements, and that the plaintiff could not recover as in the ordinary case of a bank paying out money on a check bearing a forged indorsement.¹⁴

But, where the person signing the checks is not aware that it is made payable to a fictitious or non-existing person, but believes that the check is payable to a real person and is to be negotiated only upon his proper indorsement, an unauthorized

13. *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. Rep. 740; *Armstrong, v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 22 N.E. Rep. 866, 6 L. R. A. 625; *Guaranty State Bank & Trust Co. v. Lively*, Tex., 149 S. W. Rep. 211.

14. *Trust Company of America v. Hamilton*, 127 N. Y. App. Div. 515, 112 N. Y. Supp. 84.

indorsement is a forgery, and if the drawee bank pays the check it may recover the money back.

This rule is illustrated in another New York decision, wherein it appeared that an employee forged his employer's check, drawn on the Federal National Bank of Pittsburg, Pa., to the order of "N. Y. Draft." At his request the bank gave him a draft upon the plaintiff bank in New York City, payable to the order of "Carroll Bros.," a firm doing business in Pennsylvania. The employee then forged the indorsement of Carroll Bros. and deposited the draft in his account in the Mellon National Bank, which forwarded it to its correspondent in New York, the defendant. When the fraud was discovered the Federal National Bank recredited its depositor with the amount of the draft, but the Mellon National Bank refused to make restitution to the Federal National Bank. The latter returned the draft to the plaintiff bank, which restored to the Federal National Bank the amount it had charged to it by reason of the draft, and brought suit to recover from the defendant. On behalf of the defendant, it was claimed that, since the employee, who worked the fraud never intended that the draft should reach the hands of the payee, Carroll Bros., it was in effect payable to a fictitious or non-existing person, and, therefore, payable to bearer, and that, consequently, the indorsement of the name of Carroll Bros. on the back of the draft was not in legal effect a forgery. But it is essential that the person making or drawing the instrument should have knowledge that the payee is a fictitious or non-existing person. And in this case the drawer had no such knowledge; in fact the drawer believed with good reason that the draft would be properly delivered to the payee. This being so the payee's indorsement was necessary before any one could gain a good title to the draft, and the plaintiff was allowed to recover.¹⁵

§147. Depositor's Duty to Examine Pass Book and Returned Vouchers.—It has long been the usage of banks to give out pass-books to their customers, in which the latter are credited with their proper deposits. These passbooks are sent in as occasion may seem to demand, often periodically and by request of the bank, as well upon the volition of the depositors, and are posted,

15. *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26, 85 N.E. Rep. 829.

and statements returned with them along with the paid checks or vouchers, showing the condition of the depositor's account upon the books of the bank. It matters little whether the passbooks are sent in voluntarily or by the request of the bank to be posted; the purpose and effect of the statements rendered by the bank in connection therewith are the same. They not only afford a means whereby the depositor may discover errors to his prejudice, but furnish evidence in his favor in the event of disputed payments by the bank. They serve to protect him against carelessness and fraud.¹⁶

Many of the losses suffered by banks through the payment of forged checks could be avoided by a proper examination of the pass book and vouchers when they are thus returned by the bank to the depositor for the purpose of showing the state of the account. Consequently, where losses of this kind have occurred it has frequently been claimed that there rests upon the depositor the duty of examining the returned passbook and vouchers to ascertain whether there are any irregularities in payments made by the bank and that a failure on the part of the depositor to perform this duty absolves the bank from liability, which would otherwise be imposed upon it. Formerly there was a conflict of authority upon this point and some of the cases held that the depositor owed no such duty to the bank.¹⁷ But, now, it is quite well settled that the depositor owes the bank the duty of making at least some examination of his pass book and vouchers, when they are received from the bank, for the purpose of discovering any unauthorized payments which may have been made.¹⁸

16. *National Bank of Commerce v. Tacoma Mill Co.*, 182 Fed. Rep. 1.

17. *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69; *Weisser v. Denison*, 10 N. Y. 68.

18. *Leather Mfgs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811; *First Nat. Bank v. Allen*, 100 Ala. 476, 14 So. Rep. 335; *McLaughlin v. First Nat. Bank*, 71 Ill. App. 329; *Dana v. National Bank of the Republic*, 132 Mass. 156; *American Nat. Bank v. Bushey*, 45 Mich. 135, 7 N. W. Rep. 725; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478; 97 N. W. Rep. 380; *Morgan v. United States Mortgage & Trust Co.*, 208 N. Y. 218; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. Rep. 969, 57 L. R. A. 529; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; *Clark v. National Shoe & Leather Bank*, 32 N. Y. App. Div. 316; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1; *Weinstein v. Bank*, 69 Tex. 38; *First Nat. Bank v. Richmond Electric Co.*, 106 Va. 347, 56 S. E. Rep. 152, 7 L. R. A. (N. S.) 744.

The rule generally expressed is that, when a depositor has had his pass book balanced, and it is returned from the bank together with the vouchers which have been paid by the bank, it devolves upon the depositor to examine, within a reasonable time and with ordinary care, the account thus rendered by the bank, and to report to the bank without unreasonable delay any errors discovered. If the depositor fails in the performance of this duty the bank is thereupon relieved from liability to the depositor for forged checks paid by it. One reason for imposing this obligation upon the depositor is that the object of balancing a pass book is to inform the depositor of the condition of his account. When the book is sent to the bank to be written up and returned with the cancelled vouchers, it is, in effect, a demand on the part of the depositor to know what the bank claims to be a statement of his account, and a return of the book with the vouchers is an answer to that demand. If no word is received from the depositor within a reasonable time thereafter the bank is entitled to assume that the account has been examined and found correct.

The depositor is, however, under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the bank.¹⁹ And it is not required that the examination be made by the depositor personally. If the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them.²⁰

The case of *First National Bank v. Allen*,²¹ was an action against a bank to recover a deposit. The money had been paid out on forged checks signed by the depositor's clerk.

19. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; *Leather Mfgs. Bank v. Morgan*, 117 U. S. 96.

20. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209.

21. 100 Ala. 476, 14 So. Rep. 335. As to whether depositor is chargeable with knowledge of dishonest clerk, to whom examination is entrusted, see *infra*. §150.

The forgeries covered a period of six months. The depositor was furnished each month with a statement of his account and all the checks which had been paid were returned to him with the statement; the examination of these was entrusted to the dishonest clerk. It was therein held that the bank was liable to the depositor only for the payments made before the furnishing of the first monthly statement.

In a Minnesota decision,²² it appeared that an employee of a corporation deposited checks payable to the corporation in the defendant bank, sometimes receiving part of the amount in cash, and sometimes the entire amount. No officer of the corporation ever examined the statements furnished by the bank, although the pass book was frequently balanced. It was held that the bank was not liable to the corporation for the money thus wrongfully appropriated by the employee. But where a bank has paid out its depositor's money on forged checks, the bank is liable to the depositor, though the latter failed to examine his account and give the bank prompt notice of the payment of the forged checks, in a case where the officials of the bank by the exercise of reasonable care, could have detected the forgeries. If the bank has acted with negligence in the matter, the fact that the depositor has also been negligent does not estop him from claiming against the bank, unless his negligence was directly connected with the forgeries.²³

§148. Extent of Depositor's Duty to Examine Account.—

The examination, in order to throw the loss upon the bank, must be more than perfunctory; it must be performed with reasonable care. An instance of an examination, which was held to be insufficient, is found in a recent decision by the New York Court of Appeals.²⁴ It there appeared that, during a period of about a year, the confidential clerk of the plaintiff, a depositor in the defendant bank, forged 28 checks and appropriated the proceeds. Five times during that period the passbook was balanced. On these occasions the clerk withdrew from the vouchers returned

22. *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. Rep. 380.

23. *New York Produce Exchange Bank v. Houston*, 169 Fed. Rep. 785; *National Dredging Co. v. President*, Del., 69 Atl. Rep. 607; See also *Leather Mfgs. Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811.

24. *Morgan v. United States Mortgage & Trust Co.*, 208 N. Y. 218.

those which he had forged and destroyed the check list. The depositor compared the genuine vouchers, delivered to him by the clerk, with the check book, but made no comparison with the pass book and never asked for the check list. The bank conceded its liability as to a few checks paid before the time when the pass book was first balanced. As to the others it was held that the bank was not liable for the reason that the depositor had been guilty of negligence contributing to the payments, while the bank was free from such negligence.

§149. Time Within Which Examination Must be Made.—

The examination, outlined in the two preceding sections, must also be made within a reasonable time. What is, or is not, a reasonable time depends, of course, upon the circumstances of each particular case, and no general rule can be laid down which will cover all cases.²⁵

§150. Examination Entrusted to Clerk by Whom Forgery is Committed.—The failure of a depositor to discover and report to the bank the fact that forged checks have been paid is frequently due to his entrusting the examination of the statement returned by the bank to the clerk by whom the forgeries were committed. Consequently the question has arisen whether, in such a case, the depositor has met the duty of examining his account which the law imposes upon him, and whether he is charged with the knowledge of the forgeries possessed by the dishonest clerk. On these questions the authorities are divided. In some of the states it is held that, when a depositor in good faith entrusts the examination of his account to a clerk, who has forged checks and collected on them, thus enabling the clerk to

25. *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. Rep. 380.

Ten days cannot be arbitrarily fixed as a proper time, under all circumstances, for a depositor to examine his pass book and vouchers, after they have been returned to him by the bank. *Kenneth Investment Co. v. National Bank of the Republic*, 103 Mo. App. 613, 77 S. W. Rep. 1002.

Where a depositor did not examine his returned vouchers until seventeen days after they were returned from his bank, it was held that the delay was not such as would relieve the bank from responsibility for a check which had been paid on a forged indorsement. *Cincinnati Nat. Bank v. Creasy*, Ohio, 18 Wkly. Law Bul. 410.

conceal his wrongdoing, the bank is nevertheless liable to the depositor.²⁶

In a Missouri decision a depositor was held entitled to recover from the bank, the amount of 21 checks, upon which his signature was forged by a confidential employee, paid by the bank to such employee, over a period during which the pass book was balanced several times, on the theory that the depositor used ordinary care when he entrusted the examination of his pass book and returned checks to such employee; hence he was not estopped from charging the bank with the amounts of such forged checks.²⁷ In *Hardy Bros. v. Chesapeake Bank*,²⁸ the court said: "The fraudulent knowledge of the agent in regard to acts and transactions outside of and beyond his employment cannot be imputed to his principal."

In another instance it appeared that an employee of a mill

26. *National Bank of Commerce v. Tacoma Mill Co.*, 182 Fed. Rep. 1. *Hardy & Bros. v. Chesapeake Bank*, 51 Md. 562; *Kenneth Inv. Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. Rep. 1002; *Wachsmann v. Columbia Bank*, 8 Misc. Rep. (N. Y.) 280, 28 N. Y. Supp. 711.

"Banks are bound to know the signatures of their depositors, and if they pay forged checks they commit the first fault and cannot visit the consequences upon the innocent depositor, who, after the fact, is also deceived by the simulated paper. So, if the depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to a clerk who is the criminal, and he fails to disclose the forged checks, the duty of the depositor to the bank is discharged, although if he had made the examination personally he would have detected them. The duty of the depositor at most is to exercise ordinary care, and this was performed when in the ordinary course he entrusted the duty of examination to the usual agent." *Wachsmann v. Columbia Bank*, 8 Misc. Rep. 280, 28 N. Y. Supp. 711, affirming 6 Misc. Rep. 62, 26 N. Y. Supp. 885.

The same rule is held to apply in a case where an employee raises the amounts of checks signed by the employer, and the examination of the returned vouchers and accounts is thereafter entrusted to such employee. *Clark v. National Shoe & Leather Bank*, 32 N. Y. App. Div. 316.

27. *Kenneth Inv. Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. Rep. 1002. In this decision it was said: "A rule that would require that the examination should be made by the depositor in person, or that would charge him with the fraud of his trusted employee, should he entrust to him the examination, would be a harsh one and at war with the relation which a bank sustains to its depositors and very much weaken the salutary rule that, a bank in paying money on the check of its depositor, does so at its peril and takes the risk of the check being genuine."

28. 51 Md. 562.

company, instead of depositing checks sent to the company, had them cashed without authority at the bank and appropriated the proceeds. These checks were not entered in the company's books when received, this matter being in charge of the same employee. In some cases he used the proceeds of one check to cover former defalcations. The company ascertained the extent of the fraud by writing to its customers. It was held that the company was not negligent in failing to discover the embezzlement and notify the bank, and that the bank was responsible for the loss.²⁹

Where a depositor personally examined the vouchers returned by the bank but was deceived as to the true state of the account by the fact that a clerk, who had forged certain checks, abstracted them before delivering the returned checks to the depositor, it was held that the depositor had discharged the duty of examining the returned vouchers and that the bank was liable.³⁰

On this question, it is held by some of the cases that a bank depositor, who entrusts the duty of examining vouchers to a clerk who has forged his employer's name on checks, is charged with the clerk's knowledge of the forgery, and that he occupies no better position than if he had received actual knowledge of the forgeries and had neglected to notify the bank.³¹

In a Virginia case a depositor's clerk raised checks drawn by the depositor to the order of "pay roll," and pocketed the amount

29. *National Bank of Commerce v. Tacoma Mill Co.*, 182 Fed. Rep. 1.

30. *Frank v. Chemical Nat. Bank*, 84 N. Y. 209.

31. *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L. R. A. 426; *Dana v. National Bank*, 132 Mass. 156; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. Rep. 969, 57 L. R. A. 529; *Myers v. Southwestern Nat. Bank*, 193 Pa. 1; *First Nat. Bank v. Richmond Elec. Co.*, 106 Va. 347, 56 S. E. Rep. 152, 7 L. R. A. 744;

In the case of the *First National Bank v. Allen*, 100 Ala. 476, 27 L. R. A. 426, the court said: "It is clear that in forging the checks Tomlin did not act within the scope of his authority, but upon what principle can it be said that in the matter of examining the passbook and vouchers he was not acting within the scope of his authority? He was appointed and directed by the plaintiff to do this very thing. If Tomlin had not been the forger, and in no manner interested in concealing the forgeries, and in making the examination of the pass book and vouchers had discovered that numbers of the checks were forgeries committed by other persons, would not such knowledge on his part be chargeable to the principal? The law is that the principal is chargeable with the knowledge of such facts as the agent acquired acting within the scope of his business. Is this rule to be changed because of the dishonesty of the agent?"

raised. The examination of the pass book and returned vouchers was made by the depositor and clerk jointly, thus enabling the clerk to conceal the fraud. It was held that the depositor could not recover from the bank.³² The court here points out the fact that, "in the commission of a forgery the employee is not the agent of his principal, and his knowledge cannot be imputed to the principal. But, after the forged checks have been paid and returned to the depositor as vouchers, with the bank account written up and balanced according to the usual business methods, if the depositor assigns the duty of examining such vouchers and account to this same clerk who has had an opportunity of committing a fraud and has done so, then such employee, in the discharge of this duty is the agent of the depositor, and such depositor is chargeable with his agent's knowledge of the fraud."

The United States Supreme Court has held that where a depositor entrusted the examination of his account to a clerk, by whom checks had been raised, it was error to direct a verdict in favor of the depositor against the bank.³³

32. *First Nat. Bank v. Richmond Elec. Co.*, 106 Va. 347, 56 S. E. Rep. 152, 7 L. R. A. 744.

33. *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96. The following quotation is taken from the opinion. "We must not be understood as holding that the examination by the depositor, of his account, must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice, to the bank, of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which mislead the bank and injure the depositor and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination; without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal, cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

§151. Duty of Depositor to Examine Account for Forged Indorsements. The authorities are well agreed upon the proposition that a depositor owes no duty to the bank, which requires him to examine his pass book and cancelled vouchers, when the same are returned from the bank, with a view to the detection of forged indorsements. The bank's contract is to pay the depositor's checks only upon genuine indorsements. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee or subsequent indorsers. The bank must, at its peril, determine the validity of such signatures. It has the opportunity of protecting itself by requiring identification when the check is presented, or a responsible guaranty or indorsement from the party presenting it. When the bank returns the check to the depositor, as evidence of payment made by his direction, the latter has a right to assume that the bank has ascertained the indorsements thereon to be genuine. Consequently, where a bank has paid out money on a check bearing a forged indorsement, the fact that the depositor did not examine the statement returned to him by the bank and look over his cancelled checks cannot be used by the bank as a defense to the depositor's claim.³⁴

§152. Depositor's Duty to Notify Bank of Payment on Forged Check.—Where the depositor learns through an examination of his pass book, or through any other source, that the bank has paid a check bearing a forgery of his signature, or a forged indorsement, or that the bank has paid a raised, or otherwise irregular check, he should give prompt notice thereof to the bank.³⁵

34. *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 7 S. E. Rep. 738, 2 L. R. A. 96; *Jordan-Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. Rep. 740; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. Rep. 693; *Masonic Ben. Ass'n. v. First State Bank, Miss.*, 55 So. Rep. 408; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *Pratt v. Union Nat. Bank*, 79 N. J. L. 117, 75 Atl. Rep. 313; *Shipman v. Bank of State of New York*, 126 N. Y. 318; *Welsh v. German-American Bank*, 73 N. Y. 424; *Califf v. First Nat. Bank*, 37 Pa. Super. Ct. 412; *United Security Life Ins. etc. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. Rep. 97; *Guaranty State Bank & Trust Co. v. Lively, Tex.*, 149 S. W. Rep. 211; *Brixen v. Deseret Nat. Bank*, 5 Utah 504, 18 Pac. Rep. 43.

35. *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 478, 97 N. W. Rep. 380; *Kenneth Investment Co. v. National Bank of the Republic*,

In a case where the drawer of a check discovered that it had been paid on a forged indorsement, and waited for six weeks after making the discovery before he notified the bank, the bank in which the check was first deposited having failed in the meantime, and it appearing that the drawee bank could have protected itself if it had received timely notice, it was held that the bank was not liable to its depositor.³⁶ If the depositor has knowledge of circumstances from which, by reasonable care and inquiry, he could discover forged indorsements, and he fails to exercise such reasonable care, and the bank thereby suffers loss, or is placed in a worse position than it would have been in if the inquiry had been made and the facts ascertained and communicated to the bank within a reasonable time, the depositor loses his recourse against the bank.³⁷ The depositor should return the forged check at the time of notifying the bank of the forgery; it has been held that mere notice to a bank that it has paid a forged check, while the depositor holds the check to investigate the crime will release the bank from all liability for having cashed the spurious check.³⁸

103 Mo. App. 613, 77 S. W. Rep. 1002; *Third Nat. Bank v. Merchant's Nat. Bank*, 76 Hun. (N. Y.) 475, 27 N. Y. Supp. 1070; *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. Rep. 891, *Cunningham v. First Nat. Bank*, 219 Pa. 310, 68 Atl. Rep. 731.

Where the drawer of a check, which the drawee bank paid on a forged indorsement, neglected to notify the bank thereof for forty-two days after he discovered the forgery, it was held that the bank was not liable to the drawer, *Connors v. Old Forge Discount & Deposit Bank, Pa.*, 91 Atl. Rep. 210.

Where the indorsement of the payee of a check is forged by a clerk of the drawer, who thus obtains the money on the check, it is held that the knowledge of the forgery possessed by the clerk cannot be imputed to the drawer so as to make it negligence on his part not to promptly notify the bank. *United Security Life Ins. & Trust Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. Rep. 97.

It was held in *United States v. National Exchange Bank*, 45 Fed. Rep. 163, that, where the drawer of a check neglected for more than a month, after discovering that it had been paid on a forged indorsement, to notify the bank of that fact, the bank was released from liability, even though it appeared that the bank had notice of the forgery from another source at about the time the drawer found it out.

36. *Cunningham v. First Nat. Bank*, 219 Pa. 310, 68 Atl. Rep. 731.

37. *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72.

38. *Van Wert Nat. Bank v. First Nat. Bank*, 6 Ohio Cir. Ct. Rep. 130.

It has been held in a number of cases, especially those involving the payment of a check on a forged indorsement, that negligence on the part of a depositor in giving the bank notice of an irregular payment, that has come to his attention, or in tendering the forged instrument to the bank, will not absolve the bank from liability unless it can show that it suffered actual damage as a result of the delay.³⁹ In this connection there is no presumption that the bank has suffered any such loss or disadvantage. This must be proved; and unless it is affirmatively shown the depositor is not estopped from recovering from the bank.⁴⁰

While the weight of authority is to the effect that the failure of a depositor to notify his bank of the payment of a forged check, promptly after his discovery of such payment, does not absolve the bank from liability, unless it appears that the bank has been damaged as a result of the delay, the better rule would seem to be that an unreasonable delay in giving notice releases the bank, although it is not shown that the delay actually resulted in loss to the bank, and that it is sufficient if it appears that the bank was deprived of the opportunity of seeking

39. *Janin v. London & San Francisco Bank*, 92 Cal. 14, 27 Pac. Rep. 1100; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N. E. Rep. 693; *Pratt v. Union Nat. Bank*, 79 N. J. L. 117, 75 Atl. Rep. 313; *Harlem Co-operative Bldg. etc. Ass'n. v. Mercantile Trust Co.*, 10 Misc. Rep. (N.Y.) 680, 31 N.Y. Supp. 790; *Third Nat. Bank v. Merchants' Nat. Bank* 76 Hun. (N. Y.) 475, 27 N. Y. Supp. 1070; *Califf v. First Nat. Bank*, 37 Pa. Super Ct. 412; *Brixen v. Deseret Nat. Bank*, 5 Utah 504, 18 Pac. Rep. 43.

As to the duty of giving notice in such cases, it was said in the case of *Third Nat. Bank v. Merchants' Nat. Bank*, 76 Hun. (N. Y.) 475, 27 N. Y. Supp. 1070: "There is no duty imposed on one who receives a forged check from another to unearth the crime. He receives it presuming, as he has a right to do, that all the signatures and indorsements are genuine, which is impliedly warranted by the person from whom it is received. This presumption and the right to rely upon this implied warranty, are only destroyed when, by inspection, the forgery could be detected because apparent on the face of the check or bill, or where, from the surrounding circumstances, the suspicions of the person receiving the note, check, or bill should be aroused and his scrutiny challenged. Not so after discovery, for then the duty is incumbent on the one detecting the imposition to act promptly in giving notice, and, if he fails therein to the injury and damage of the one entitled to notice, he will be prevented from recovering the damage or injury shown to have been actually incurred."

40. *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72.

to compel restoration from the person who committed the forgery or the one to whom the payment was made.⁴¹

On this point it was said in a Pennsylvania decision of recent date: "As soon as a bank learns that it has paid a check on a forged signature of a depositor, or on a forged indorsement on his check, it is its duty to promptly restore to the depositor's account what was improperly taken from it, and its right at the same time is to proceed against those who wrongfully got the money. This right is to proceed immediately, and to the promptness with which a bank is able to exercise its recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and, when one of its depositors discovers that he has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for, by withholding from it what he has discovered, he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but, by prompt proceedings against him, others may become interested in him and come to his assistance, who, after delay, may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked."⁴²

§153. Statute of Limitations as to Payment on Forged Check.

—The time within which an action must be commenced by a depositor against the bank, to recover an amount claimed to have been paid out by the bank on a forged check, is limited by statute expressly covering such payments, in a number of the states, the period of limitation varying widely in the different jurisdictions. Under these statutes, the time usually begins to run at the time when the vouchers, claimed by the depositor to be forgeries, are returned to him by the bank. By an addition to the Negotiable Instruments Law, it is provided in New York

41. *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. Rep. 891; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96, 29 L. Ed. 811.

42. *McNeely Co. v. Bank of North America*, 221 Pa. 588, 70 Atl. Rep. 891.

that no bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised.⁴³

43. Negotiable Instruments Law, Section 326 of the New York Act. Construing this provision of the statute, it was held in *Shattuck v. Guardian Trust Co.*, 145 N. Y. App. Div. 734, 130 N. Y. Supp. 658 that the notice required must be given to an officer, or officers of the bank having authority to receive it; a notice given to an individual director is not a sufficient compliance with the statute unless it is communicated by him to the board of directors, or the officers of the bank, or unless it appears that the director had authority to represent the bank for the purpose of receiving such notices.

A similar statute is in force in New Jersey, Act of April 13th, 1908, P. L., page 428. See *Pratt v. Union Nat. Bank*, 79 N. J. Law 117, 75 Atl. Rep. 313.

CHAPTER XII.

PAYMENT OF CHECKS.

- §154. Bank's Obligation to Pay Depositor's Checks.
- §155. What Constitutes Payment.
- §156. Effect of Payment.
- §157. Bank's Right to Indorsement upon Paying Check.
- §158. Bank not Bound to take Notice of Memoranda in Check.
- §159. Payment of Stale Checks.
- §160. Checks Not Properly Signed.
- §161. Check Drawn on Blank Form of Another Bank.
- §162. Lost and Stolen Checks.
- §163. Payment of Checks Obtained by Fraud.
- §164. Payment of Postdated Checks.
- §165. Checks Drawn against Separate Accounts.
- §166. Payment of Checks Signed by Agent.
- §167. Payment of Checks Drawn against Deposit in Name of Agent, Trustee etc.
- §168. Checks Paid when Bank Insolvent.
- §169. Order in Which Checks should be Paid.
- §170. Payment of Check where Deposit Insufficient.
- §171. Payment of Checks of Insane Persons.
- §172. Revocation of Check by Drawer's Death or Insolvency.
- §173. Agreement to Honor Checks.
- §174. Liability of Bank for Refusing to Honor Checks Drawn by Depositor.
- §175. Liability of Bank to Depositor Where it Refuses to Honor Check through Mistake.
- §176. Where Bank may be Justified in Refusing to Honor Depositor's Check.
- §177. Measure of Damages for Refusing to Honor Check.

§154. Bank's Obligation to Pay Depositor's Checks.—One of the implied terms of the contract between a bank and its depositor is that the bank will pay his checks, properly drawn

and presented, if he has on deposit sufficient funds to his credit. A wrongful refusal on the part of the bank to pay a depositor's check, renders it liable to the depositor for such damages as are the natural and reasonable consequences of the refusal.¹

There are, of course, many circumstances under which a bank is justified in refusing to pay a check, at least until it has had time to investigate its validity. The bank should, for instance, refuse to honor a check where it has notice or is put upon inquiry as to some irregularity. Thus, where a check had been torn in pieces and pasted together again, and in this shape was paid by the bank without inquiry, it was held that the laches of the bank were so great that it should bear the loss.² A bank is not, however, placed upon inquiry by the fact that the year is omitted from the date on a check so as to make it liable for its payment,³ nor is a bank put upon inquiry by the fact that the body of a check is not in the handwriting of the drawer.⁴

A bank is under a duty to scrutinize checks drawn upon it and to exercise proper care to prevent its employees from defrauding its depositors by making false entries in their accounts.⁵

§155. What Constitutes Payment.—In order to constitute payment of a check it is not necessary that the cash therefor be delivered over to the party demanding payment. The giving of credit by the drawee to the holder for the amount of the check is sufficient to constitute an irrevocable payment. When credit is duly given in such a case the situation is the same as though the cash had been paid by the bank to the holder and then redeposited in the bank by the holder to his credit.⁶

1. See, *infra*, § 174-177.

2. Scholey v. Ramsbottom, 2 Camp. (Eng.) 485; Ingham v. Primrose, 7 C. B. N. S. (Eng.) 82.

3. Israel v. State National Bank, 124 La. 885, 50 So. Rep. 783.

4. First State Bank v. Vogeli, Kan., 96 Pac. Rep. 490.

The fact that the body of a check returned to a depositor is in a strange handwriting is held sufficient to arouse his suspicion and to require him to inform the bank of the fact, if he would preserve his right to recover from the bank on the ground that the signature was a forgery. Israel v. State Nat. Bank, 124 La. 885, 50 So. Rep. 783.

5. Brown v. Lynchburg Nat. Bank, 64 S. E. Rep. 950, 109 Va. 530.

6. American Nat. Bank v. Miller, 185 Fed. Rep. 338; Second Nat. Bank v. Gibboney, 43 Ind. App. 492, 87 N. E. Rep. 1064; Bartley v. State, 53 Neb. 310, 73 N. W. Rep. 744.

This doctrine that the crediting of a check constitutes payment is frequently invoked in cases where the holder of a check deposits it to his credit in the bank on which it is drawn. In these cases it is generally held that if the bank discovers that the check is an overdraft after the amount has been credited to the payee's account, the check is irrevocably paid and the bank cannot cancel the credit thus given.⁷

In a case involving the question whether there had been a payment of a check, it appeared that the plaintiff bank, being the owner of a check drawn on the defendant bank, forwarded it to a correspondent bank for collection, and when it was received by the drawee bank, that bank marked the check "paid," charged it against the account of the drawer and credited it to the account of the correspondent bank, the plaintiff's agent. Some time on that day a person appeared at the bank and notified it that the money on deposit to the credit of the drawer belonged to him and instructed the bank not to pay any checks against the deposit. The next day the defendant bank cancelled the "paid" mark on the check and made entries on its books, crediting the amount to the account of the drawer and charging it against the account of the correspondent bank. The check was then protested and returned to the plaintiff. It was held that this was in legal effect a payment of the check and that the credit thus given could not be revoked; that the situation was the same as though the check had been presented at the teller's window and paid in cash, and that the defendant was liable to the plaintiff.⁸

Where the plaintiff sent a check to the defendant bank, requesting it to send him the cash, and the defendant mailed him the amount in an unregistered letter which was never

7. See, *infra*, §188.

In *Levy v. Bank of United States*, 4 Dallas (Pa.) 234, it was held that, where a depositor in a bank presented to it a check purporting to be drawn upon it by another depositor, which was credited as cash in his pass-book, there was a final and irrevocable payment and that the bank could not revoke the credit upon discovering that the signature on the check was a forgery. The court declared that any attempt to distinguish between credit given in a customer's pass-book and an actual cash payment was as impolitic on the part of the bank as it was unjust to the customer who accepted the credit instead of money.

8. *Consolidated Nat. Bank v. First Nat. Bank*, 129 N. Y. App. Div. 538, 114 N. Y. Supp. 308.

received by the plaintiff, it was held that there had been no payment of the check and that the defendant was liable to the plaintiff.⁹

Where a check, sent by mail to the drawee bank, is marked "paid," and the drawee sends its draft which proves to be worthless because of the failure of the bank before the presentment of the draft, the check is deemed to be paid as between the drawer and the holder. The loss is the result of the holder's own negligence in sending the check directly to the drawee instead of having it presented by some bank or other agent, and the holder can maintain no action on the check against the drawer.¹⁰ The holder, however, is not always without a remedy in such case. If the holder delivers the check to a bank for collection and this bank, acting on its own responsibility, sends the check directly to the drawee, the holder may recover from the initial bank any loss sustained as a result of this method of collection.¹¹

§156. Effect of Payment.—In the absence of fraud or other vitiating circumstance affecting its rights, a bank, upon paying a check drawn upon it, terminates its liability to the depositor to the extent of the amount paid.¹² The payment of a check by the drawee bank, under such circumstances, also extinguishes the check and the bank cannot, by thereafter putting the check again into circulation, create a liability thereon against the drawer or against a prior indorser.¹³

§157. Bank's Right to Indorsement upon Paying Check.—While it is usual for the payee or other holder of a check to indorse it at the time of receiving payment, such indorsement is not necessary to give validity to the payment. Upon the bank's right to insist that a check be indorsed before payment it has been said that a drawee bank "is authorized and *required* to pay the money to the payee, knowing him to be the identical

9. *Clay City Nat. Bank v. Conlee*, 106 Ky. 788, 51 S. W. Rep. 615.

10. *O'Leary v. Abeles*, 68 Ark. 259, 57 S. W. Rep. 791. *Contra. McIntosh v. Tyler*, 47 Hun. (N. Y.) 99. See also, *supra*, §8.

11. See, *infra*, §195-199.

12. *Southern Hardware & Supply Co. v. Lester*, 166 Ala. 86, 52 So. Rep. 328.

13. *Aurora State Bank v. Hayes-Eames Elevator Co.*, Neb., 129 N. W. Rep. 279.

man indicated, without any indorsement and without any receipt."¹⁴

§158. Bank not Bound to take Notice of Memoranda in Check.—As a general rule a bank, on which a check is drawn, is not bound to take notice of memoranda on the margin or in the body of the check, placed thereon for the convenience of the drawer to preserve information for his benefit, or for the purpose of showing the transaction in which the payment was made.¹⁵

In a case involving this rule it appeared that a bank had been appointed depository for the United States District Court. In depositing the funds of bankrupt estates the clerk marked on the deposit slip a number representing the case in which the funds were received, but the deposits were all kept in a single account on the books of the bank. Checks drawn against the account were marked with the number of the case in which the check was given. Several checks were paid bearing numbers of cases in which no deposits had been made. A check was given in case #2105, but at the time it was presented the deposits had been entirely checked out. It was held that the holder of this check had no rights thereon against the bank. The bank was under no obligation to keep track of the case numbers as they appeared on the various deposit slips and to see to it that the clerk of the court did not draw, in the administration of any particular case, a larger amount than had already been deposited to the credit of that case.¹⁶

14. *Osborn v. Gheen*, 5 Mackey (D. C.) 189. But see, *infra*, §174.

15. *State Nat. Bank v. Dodge*, 124 U. S. 333; *State National Bank v. Reilly*, 124 Ill. 464, 14 N. E. Rep. 657; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 38 Atl. Rep. 983; *Denton National Bank v. Kenney*, 116 Md. 24, 81 Atl. Rep. 227; *Brown v. Cow Creek Sheep Co.*, Wyo., 126 Pac. Rep. 886.

16. "No bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case, the memoranda and figures are not a notice to the bank that the particular check is to be paid only from a particular fund. So, too, a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other deposits placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank." *State Nat. Bank v. Dodge*, 124 United States 333.

Where the abbreviation "Atty." followed the name of the payee designated in the check and the words, "In full for A. J. Kenney, Mortgage," were written in the margin of the check, it was held that such memoranda did not put the bank upon notice that the check represented funds which the payee received for a client and that the bank was justified in permitting the payee to deposit the check to the credit of his personal account in the bank. In this case it was held that the bank was entitled to apply the proceeds of the check to the payment of a debt owing to it from the payee.¹⁷

§159. Payment of Stale Checks.—The question when a check becomes stale or overdue usually arises when it becomes necessary to determine whether a holder is a holder in due course so as to be entitled to enforce a check, notwithstanding defenses that may exist as between the original parties.¹⁸

There is not much authority as to when a check becomes stale so as to put the drawee bank upon inquiry when it is presented for payment. Undoubtedly when a check is presented for payment an unusually long time after its date, the drawee bank is justified in withholding payment temporarily for the purpose of making inquiry and such act on the part of the bank should not be construed as an absolute refusal to pay, such as might render the bank liable for damages to the drawer. Whether or not the bank is under an absolute duty in such case, to make inquiry or to notify the drawer before paying the check, is a question somewhat involved in doubt. The drawer of the check is, of course, always liable upon it to a holder in due course at any time within the period limited by the statute of limitations, unless the holder has lost his right to enforce the check by reason of his delay in presentment.¹⁹ And if the check is paid to a holder in due course, it would seem that the drawer could not repudiate the payment on the ground that the check had become stale before the payment was made. If the check is paid to one against whom the drawer would have a defense in an action on the check, there would be at least some ground for holding that the drawer might repudiate the

17. *Denton National Bank v. Kenney*, 116 Md. 24, 81 Atl. Rep. 227.

18. See, *supra*, §61.

19. See, *supra*, §77.

payment if it were made after the elapse of an unreasonable period of time.

It has been held that a check drawn on Christmas Eve "at the beginning of the season when business is suspended for a greater or less period everywhere," does not become stale in six days so as to put the bank upon inquiry when the check is presented at the end of that period.²⁰ But where a bank paid a check more than a year after its date at a time when the drawer's deposit was not sufficient for that purpose, and it appeared that the drawer had, in the meantime, paid the debt for which the check was given, it was held that the bank could not recover in an action against the drawer for the overdraft.²¹

§160. Checks Not Properly Signed.—A bank is not only justified in refusing to pay a check not properly signed, but is under an obligation to its depositor to refuse to honor such a check. Thus where the signature cards, filed with a bank by a corporation, contain the signatures of both the president and treasurer of the corporation, the bank is responsible to the corporation for paying checks bearing only the signature of the treasurer.²²

But when a bank refuses to pay a check because the signature is not in proper form, it should make known its reasons for not honoring the check. In a case where one duly authorized by a depositor to draw against his account, presented a check properly signed, except that it omitted the abbreviation, "Jr.," after the depositor's name, and the bank refused to pay the check without specifying its reasons therefor, it was held that the bank could not justify its refusal on the ground of this omission, no objection having been made at the time.²³

§161. Check Drawn on Blank Form of Another Bank.—There is no invariable rule which requires a depositor to use blank check forms prepared by the bank in which he keeps his deposit, and in the ordinary course of business it is not uncom-

20. *Merchant's & Planters' Nat. Bank v. Clifton Mfg. Co.*, 56 S. C. 320, 33 S. E. Rep. 750.

21. *Lancaster Bank v. Woodward*, 18 Pa. St. 357.

22. *Shoe Lasting Machine Co. v. Western Nat. Bank*, 70 N. Y. App. Div. 588, 75 N. Y. Supp. 627. See also *supra* §11.

23. *State Bank v. Batty*, 5 Ill. 200.

mon for a depositor to use a blank check issued by some bank, other than the one in which his money is deposited, erase the drawee's name and write in its place the name of his own bank. It is therefore held that a drawee bank is not guilty of negligence in paying the check merely because the check is drawn on a blank issued by some other bank.²⁴ But where a check, drawn on a blank form issued by one bank, is wrongfully altered by striking out the name of that bank and inserting the name of another bank, the latter bank will be liable to the drawer if it pays the check.²⁵

§162. Lost and Stolen Checks.—Where a check has been lost by the holder and paid by the drawee bank to the finder or some other person, the liability of the bank depends upon the circumstances. If the check is collected on a forged indorsement, the bank cannot, of course, charge it against the drawer's account. In such case, however, the bank may recover the amount paid on the check even from a bona fide holder. But, if the check at the time of being lost was transferrable by delivery, that is, if it was payable to bearer or indorsed in blank, the bank is protected if it pays in good faith, and the payment is a proper charge against the drawer's account.²⁶

In a case where a check indorsed in blank was lost, and was paid by the drawee bank to a holder in due course, it was held that the true owner of the check could not recover in an action against the bank, although he and the drawer had notified the bank of the loss of the check and had directed the bank not to pay; the holder had acquired a perfect title and the payment was authorized.²⁷

24. *First State Bank v. Vogeli*, Kan., 96 Pac. Rep. 490.

25. *Morris v. Beaumont Nat. Bank*, 37 Tex. Civ. App. 97, 83 S. W. Rep. 36. In this case it appeared that the drawer of two checks stopped payment and transferred his account to another bank to guard against the possibility of payment. The checks were altered by fraudulently substituting the name of the second bank as drawee, and this bank, having had no warning that such checks were outstanding, paid them. It was held that the second bank was liable to the drawer.

26. See *supra* §25 and 26.

27. *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. Rep 655.

In *Clinton Nat. Bank v. Stiger*, 67 N. J. Eq., 522, 58 Atl.Rep. 1055, it was held that where cashier's checks were lost by the owner, he could

A depositor is under a duty not to carelessly permit his check to get into the hands of one for whom it was not intended. Thus, where a person signed checks in blank to be filled up and used by his bookkeeper in the conduct of his business and one of them was stolen from his safe, wrongfully filled out and collected, it was held that the payment by the bank was valid as against the drawer. By placing his signature on the blank check he assumed the risk of theft, however slight it may have been.²⁸

§163. Payment of Checks Obtained by Fraud.—A bank is not held liable to its depositor where it pays his check in good faith merely because of the fact that the check was obtained from the depositor by fraud.²⁹ Thus, where a check was obtained from the drawer by the payee's fraudulent representations as to a certain real estate transaction, and the payee thereafter appropriated the proceeds and fled the country, it was held that the drawee bank, having acted in good faith, was not responsible to the drawer.³⁰ In one instance a bank was held liable to its depositor where it appeared that the check had been obtained from the depositor by trick. It further appeared in this case, however, that the signature on the check was not in the form

not recover the amount in an action against the bank by which the checks were issued without giving indemnity. The checks were payable to order and it did not appear in the case whether or not they were indorsed.

28. *Trust Company of America v. Conklin*, 65 Misc. Rep. (N. Y.) 1, 119 N. Y. Supp. 367.

29. *Southern Hardware & Supply Co. v. Lester*, 166 Ala. 86, 52 So. Rep. 328; *Cathers v. National Bank of Commerce*, 85 Kan. 622, 117 Pac. Rep. 1016.

Referring to certain checks obtained by fraud it was said in *Southern Hardware & Supply Co. v. Lester*, 166 Ala. 86, 52 So. Rep. 328: "If the banks had no notice of the fraud underlying the issuance of the checks, and none whatever was shown, the banks were guilty of no negligence in honoring them. The checks were not forgeries in such sort as to render the banks liable for the sum so paid out on them in an action by the appellant against the bank. These checks were in themselves genuine. Their infirmity lay in the fact that as the effect of an illegal cause they were issued. If, to reiterate, the banks paid them without notice of the wrongful conduct innocently superinducing their (checks') issuance, the banks were not negligent, and the sums so paid were discharges *pro tanto* of the debtors' (banks') liability to their creditor, the drawer of the checks."

30. *Cathers v. National Bank of Commerce*, 85 Kan. 622, 117 Pac. Rep. 1016.

which had been agreed upon between the bank and the depositor.³¹

Where the owner of a check indorses it so that it is payable to bearer and delivers it to another, the drawee bank is protected in paying the check in the absence of notice of any limitation upon the holder's authority, though it was merely delivered for the purpose of being placed to the credit of the owner's account.³²

§164. Payment of Postdated Checks.—There is no doubt that one may issue his check dated in the future and that, when the date of the check arrives, the instrument becomes a valid negotiable instrument.³³ But, while a check may pass from hand to hand prior to the time of its date, and while its validity and negotiability is not impaired by that fact, it is not subject to acceptance or payment by the bank on which it is drawn until the time of its date arrives.³⁴

If a check of this kind is presented in advance of its date the drawee bank, even though it has funds of the drawer on deposit, sufficient to pay it, should not make payment or set aside any fund for that purpose. If the bank does pay the check or withhold money for that purpose and, by reason of its action, other checks drawn by the depositor are dishonored, the bank subjects itself to an action for damages at the instance of the depositor. The drawer of the postdated check does not undertake to have funds in the hands of the drawee for the payment of the check before the arrival of the time at which the check bears date, and he is justified in assuming that the bank will not take any action with regard to the check until that time.³⁵

31. *Polizzotto v. People's Bank*, 125 La. 770, 51 So. Rep. 843.

32. *Peerrot v. Mt. Morris Bank*, 120 N. Y. App. Div. 247, 104 N. Y. Supp. 1045.

33. *Johnson v. Harrison, Ind.*, 97 N. E. Rep. 930; *Symonds v. Riley*, 188 Mass. 470, 74 N. E. Rep. 926; *Albert v. Hoffman*, 117 N. Y. Supp. 1043, 64 Misc. Rep. (N. Y.) 87.

34. *Wilson v. McEachern, Ga.*, 71 S. E. Rep. 946; *Frazier v. Trow P. & B. Co.*, 24 Hun. (N. Y.) 281; *Mohawk Bank v. Broderick*, 13 Wend. (N. Y.) 133; *Salter v. Burt*, 20 Wend. (N. Y.) 205.

35. *Smith v. Maddox-Rucker Banking Co.*, 8 Ga. App. 288, 68 S. E. Rep. 1092. A check drawn by the plaintiff on the defendant bank for \$140, dated May 15, 1905, was presented to the bank and charged to the

§165. Checks Drawn Against Separate Accounts.—When a depositor, having two accounts in his own right, kept separately merely for his own convenience, draws on one of them beyond the amount to his credit, without any arrangement with the bank that he should do so, the bank is justified in the inference that he intends the check to be protected by the other account. It would clearly be most unreasonable that the bank should be required, under such circumstances, to pay checks drawn by the depositor on one of the accounts in excess of the amount deposited in that account without having the right to deduct excess from the other account.³⁶ But where a depositor, having two accounts in a bank, authorizes another person as his agent to draw checks against one of the accounts, the bank will not be permitted to charge checks drawn by such agent against the other account.³⁷

§166. Payment of Checks Signed by Agent.—A bank depositor may appoint an agent with authority to sign checks in his, the depositor's name. In such a case if the agent wrongfully uses a check signed by him in the depositor's name for his own purposes, the drawee bank is not responsible to the depositor for honoring the check, unless it has notice of the unlawful use of the check by the agent, or notice of facts or circum-

plaintiff's account on April 17th. In the meantime the plaintiff drew two checks which the bank refused on presentment because of insufficient funds. It appeared that the deposit would have been sufficient to pay the two checks had the \$140 check not been charged to the plaintiff's account. A verdict for \$400 in favor of the plaintiff was affirmed.

See also *Frazier v. Trow's P. & B. Co.*, 24 Hun. (N. Y.) 281; *Godin v. Commonwealth Bank*, 13 N. Y. Super. Ct. 76.

A bank, which received a postdated check drawn upon it, promising to pay it when due, and entered the amount as a deposit to the credit of the holder, who was not a depositor, was held liable to him where the drawer's deposit was sufficiently large to pay it on the morning when it became due, but his account was overdrawn at the close of banking hours on that day. *Second Nat. Bank v. Averell*, 2 App. D. C. 470.

36. *Hiller v. Bank of Columbia*, S. C., 75 S. E. Rep. 789.

37. *Hiller v. Bank of Columbia*, S. C., 75 S. E. Rep. 789.

Where an agent authorized to draw checks against the account of a corporation depleted the account and the bank thereafter paid checks drawn by the agent out of the personal account of the president of the corporation, it was held that the bank was liable to the president for the amount thus paid out of his personal account. *Crab v. Citizens' State Bank*, Idaho, 126 Pac. Rep. 520.

stances that should apprise it of the unlawful object for which the check was drawn.³⁸

Where a depositor left with his bank a power of attorney authorizing his clerk to draw checks against his deposit for fifteen days only and the clerk, after the expiration of the fifteen days, continued to draw checks, appropriating the proceeds to his own use, it was held that the bank was liable to the depositor. It had no right to assume that the clerk's authority to draw checks continued after the period designated in the power of attorney had elapsed.³⁹ And, where a bank, knowing that an agent had authority only to draw checks in the name of his principal for spot cotton, honored checks drawn by the agent payable to the manager of a concern conducting a bucket shop, and the bank knew the business of the concern and credited the amounts of the checks honored to the account of the concern, it was liable to the principal for the misappropriation of his funds.⁴⁰

It is held that a drawee bank is not put upon notice by the form of the checks, drawn upon it by a corporation and payable to the order of the officer who signed in behalf of the corporation. In this case the treasurer of a railroad company, which kept its account in the defendant bank, drew checks against the deposit signed by himself as treasurer and payable to his own order, and deposited them to his individual credit in another bank. The treasurer, who was authorized to sign proper checks in behalf of the railroad company, appropriated to his own use the proceeds of these checks upon their collection. It was held that the drawee bank was not liable to the railroad company.⁴¹

38. *W. R. Miller & Co., v. Hobdy*, Texas, 159 S. W. Rep. 96; *Interstate National Bank v. Claxton*, 97 Tex. 569, 80 S. W. Rep. 604.

Revocation of Agent's Authority—The plaintiff, who kept her account in the defendant bank, instructed the bank not to pay any checks thereafter drawn by a person purporting to act as her agent. The bank, however, allowed the agent to withdraw the funds then on deposit, and also honored later checks drawn by him against the fund subsequently deposited by the plaintiff. It was held that the bank could not escape liability as to the subsequent checks on the ground that the revocation of the agent's authority applied only to funds then on deposit, and not to moneys thereafter deposited. *Stroll v. Commercial Nat. Bank, Utah*, 140 Pac. Rep. 115.

39. *Manufacturers Nat. Bank v. Barnes*, 65 Ill. 69.

40. *W. R. Miller Co. v. Hobdy*, Tex., 159 S. W. Rep. 96.

41. *Havana Central R. R. Co. v. Central Trust Co.*, 204 Fed. Rep. 546.

§167. Payment of Checks Drawn Against Deposit in Name of Agent, Trustee, etc.—When an account is opened in the name of a person as agent, trustee, guardian, administrator, or in some other fiduciary capacity, the bank is entitled to honor checks drawn by the depositor against the deposit without inquiry. The bank is under no obligation to any of the persons interested in the fund to make an investigation for the purpose of ascertaining the object of the withdrawal, or the depositor's disposition of the funds. The bank must presume, in the absence of knowledge to the contrary, that the depositor will devote the money to proper and lawful uses. If, after withdrawing the money, the depositor misappropriates it, his action throws no liability upon the bank.⁴² Thus, where a person opened an account in his name as attorney for another and checked out and appropriated the deposit on checks signed by him as such attorney, the bank having no knowledge of the misappropriation, it was held that the bank was not liable to the person to whom the money belonged.⁴³

This does not mean that the bank may treat such a deposit, under all circumstances, as though it belonged to the depositor

42. *State Nat. Bank v. Reilly*, 124 Ill. 464; *Board of Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51; *United States F. & G. Co. v. Adoue, Tex.*, 137 S. W. Rep. 648; *First State Bank v. Hill*, 141 S. W. Rep. 300.

In *Board of Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51, it was said: "The contract, arising by implication of law, from a deposit of money in a bank is, that the bank will, whenever required, pay out the money in such sums and to such persons as the depositor shall designate by his checks. The deposit is made to subserve the convenience of the depositor, with the understanding that he shall have the right to draw checks against it at his pleasure. And even when it is known that the money deposited is held by the depositor as a trustee, the bank is bound to presume, in the absence of knowledge to the contrary, that a check drawn against the money by the depositor has been drawn by him in the proper discharge of his duty as trustee, and to pay the check accordingly."

A bank has no right to pay checks, purporting to be signed by a person individually, out of an account kept in his name as administrator, the administrator having no personal account in the bank, *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207.

As to deposit and collection of checks, payable to agent, trustee, etc., see, *infra*, §211.

43. *Pennsylvania Title & Trust Co. v. Real Estate L. & T. Co.*, 201 Pa. 299, 50 Atl. Rep. 998.

individually. A bank may not, for instance, assert or enforce a lien against funds placed in the bank by a depositor in a fiduciary capacity for any claims it may hold against the depositor individually.⁴⁴

While the bank is protected in paying checks drawn by an agent or trustee, where it has no knowledge that the money is being appropriated by the agent or trustee, the bank will be held liable where it knowingly participates with a depositor in a misappropriation of trust funds and reaps the benefit of the transaction,⁴⁵ as where a bank credits checks drawn by the administrator of an estate against the estate's account to the individual account of an administrator, which at the time is overdrawn.⁴⁶

Where a county collector deposited in a bank, money collected for the state and drew a check against the fund to pay a debt owing from him to the bank, the bank having knowledge that the money belonged to the state, it was held that the bank was liable for the amount appropriated.⁴⁷ And where

44. *Union Stock Yards Nat. Bank v. Gillispie*, 137 U.S. 411.

In *National Bank v. Insurance Co.*, 104 U. S. 54. It was said: "When against a bank account, designated as one kept by the depositor in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist in whole or in part, of funds held by him in a trust relation."

45. *Manhattan Web Co. v. Aquidneck*, 133 Fed. Rep. 76; *Carroll County Bank v. Rhodes*, 69 Ark. 43, 63 S. W. Rep. 68; *Fidelity & Dep. Co. of Maryland v. Rankin*, Okla., 124 Pac. Rep. 71; *Washbon v. Lin-scott State Bank*, 87 Kan. 698, 125 Pac. Rep. 17; *W. R. Miller & Co. v. Hobdy*, Tex., 159 S. W. Rep. 96.

46. *Allen v. Puritan Trust Co.*, 211 Mass. 409, 97 N. E. Rep. 916.

47. *Carroll County Bank v. Rhodes*, 69 Ark. 43, 63 S. W. Rep. 68. In the opinion it was said: "Where money is placed as a general deposit in a bank, it is no longer the property of the depositor, but immediately becomes the money of the bank. The depositor becomes the creditor of the bank, and the bank his debtor; and the bank is bound by an implied contract to honor the checks of the depositor to the extent of his deposit. When the checks are drawn in proper form, the bank is bound to honor them. It cannot excuse a refusal to pay them by showing that it had reason to believe that the checks were given for an unlawful purpose, or that other persons had liens or claims on the money deposited. But there is an exception to this rule. If the banker has notice that the fund does not belong to the depositor, and the check is drawn to pay a

the president and cashier of a corporation drew a check against the company's account and delivered it to the drawee bank in payment of their personal obligation, the bank having knowledge of the misappropriation, it was held that the bank was liable for the amount of the check to the receiver subsequently appointed for the corporation.⁴⁸

A decision of the Court of Appeals of Georgia is in point. It appeared that one Cooper was the administrator of an estate, among the assets of which was an insurance policy for \$5,000. A check for this amount, payable to him as administrator, was deposited by him in his individual account in the defendant bank, the American Trust & Banking Co. He stated at the time to the bank's officer that he was the sole heir of the estate, which statement was untrue. He had become indebted to the bank in the sum of \$1,910.74, which obligation was evidenced by promissory notes. The bank, claiming to act under instructions from him, charged this amount against his account. In holding that the bank could not retain this money as against its rightful owners, the Court made the following observations. "Every person is presumed to have the intention of discharging whatever duty the law may cast upon him. It is therefore presumed that a trustee will faithfully administer the trust, and will not misappropriate the funds of the estate which are committed to his care. When a trustee deposits money in a bank, the bank has a right to assume that the money so deposited will be applied by the trustee to the proper purposes under the trust; and, acting upon this assumption, it may lawfully pay the checks drawn by the person depositing the money, whether signed in his representative capacity or not. But while this is true, if it actively aids the trustee in misappropriating the fund, and especially if it participates in the misappropriation, and receives the fruits of such misappropriation by obtaining payment of a debt due it by the trustee in his individual capacity, the bank would be liable to the true owners of the

debt due the bank, then the banker would be affected with a knowledge of the unlawful intent, and would be in duty bound to dishonor the check, and, if he did not do so, would be a participant in the profits of the fraud, and liable to the owner of the fund for all moneys appropriated to its payment."

48. *Kelsey v. Bank of Mansfield*, 85 N. Y. App. Div. 334, 83 N. Y. Supp. 281.

fund for the amount thus wrongfully appropriated by it to its own uses."⁴⁹

These holdings are in keeping with the general rule that where a check is signed by an agent in the name of his principal, or where a check payable to the principal is indorsed by the agent in the principal's name, and the check is offered by the agent in settlement of his own personal obligation, the person to whom the check is so offered is put upon inquiry as to the extent of the agent's authority by the form of the check, and will be compelled to restore the amount to the principal, if it is later found out that the agent acted without proper authority.⁵⁰

In a case decided by the Supreme Court of Errors of Connecticut it appeared that one Layton who was cashier of the defendant bank was also administrator of an estate and had a large sum in the bank on deposit to his credit as administrator. Layton was also a stockholder and director in a corporation, and was personally interested in supporting his credit. In his zeal for the welfare of the corporation, he misappropriated funds of the estate to the extent of \$60,000, by checks signed as administrator and payable to his own order. The facts were known to the teller and bookkeeper of the bank who were under Layton's authority, and it appeared that Layton was enabled to misuse the funds of the estate, because of the fact that the directors of the bank had substantially surrendered to him the performance of their duties, and permitted him to conduct the affairs of the bank almost without interference or supervision on their part. Under these circumstances it was held that the bank was liable to the estate for the money appropriated by the cashier.⁵¹

49. *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. Rep. 182.

50. *Manhattan Web Co. v. Aquidneck Nat. Bank*, 133 Fed. Rep. 76; *Johnson Kettell Co. v. Longley Luncheon Co.*, 207 Mass. 52, 92 N. E. Rep. 1035; *St. Louis Charcoal Co. v. Lewis*, 154 Mo. App. 548, 136 S. W. Rep. 716; *Coleman v. Stocke*, 159 Mo. App. 43, 139 S. W. Rep. 2161; *Ward v. City Trust Co.*, 192 N. Y. 61, 84 N. E. Rep. 585; *Gerard v. McCormick*, 130 N. Y. 261.

As to whether a person taking a check under such circumstances is a holder in due course, see section 62.

51. *Lowndes v. City Nat. Bank*, 82 Conn. 8, 72 Atl. Rep. 150, in the opinion the court said: "The situation thus presents this condition: The directors, with what in legal contemplation was knowledge of what

§168. Checks Paid when Bank Insolvent.—If a bank, though still conducting business, is known to its officers to be insolvent and pays the check of a depositor in the usual course of business, the depositor having no notice of the insolvency, the payment is good and a receiver subsequently appointed for the bank, cannot recover back the amount paid as an unlawful preference,⁵² even though the payment was made during a run on the bank.⁵³

Actual knowledge on the part of a depositor of the insolvent condition of the bank at the time of the payment of his check in the regular course of business will not in itself stamp the transaction as an unlawful preference so as to render the depositor liable for the amount of the payment to a subsequently appointed receiver.⁵⁴ It has been held that even where one of the direc-

Layton had been doing through the machinery of the bank and with respect to funds entrusted to it, and being cognizant of their failure in the duty of oversight and control, continued him in his place of authority, and continued their negligent failure to surround him with the safeguards of their oversight and supervision. He was thus furnished by the directors with the opportunity, the means and the authority to continue his known irregularities and frauds upon the deposit in question, and to cause any additional frauds thereupon to be successfully consummated. That which was to have been expected, that which the directors must therefore be presumed to have anticipated, happened. Layton kept on abusing his office and his authority therein, and by means of them, through the machinery and organization of the bank, misappropriating the funds of that deposit."

52. *McDonald v. Chemical Nat. Bank*, 174 U. S. 610; *Stone v. Jenison* 111 Mich. 592, 70 N. W. Rep. 149; *Dutcher v. Importers' & Traders Nat. Bank*, 59 N. Y. 5; *Livingstain v. Columbian Banking & Trust Co.*, 81 S. C. 244, 62 S. E. Rep. 249.

53. *Stone v. Jenison*, 111 Mich. 592, 70 N. W. Rep. 149.

54. *Wilson v. Baker Clothing Co.*, Idaho, 137 Pac. Rep. 896; *O'Brien v. East River Bridge Co.*, 161 N. Y. 539, 56 N. E. Rep. 74; *Livingstain v. Columbian Banking & Trust Co.*, 81 S. C. 244, 62 S. E. Rep. 249.

In *McDonald v. Chemical Nat. Bank*, 174 U. S. 610, 43 L. Ed. 1106, it was said: "It is a matter of common knowledge that banks and other corporations continue in many instances to do their regular and ordinary business for a long period, though in a condition of actual insolvency. It surely cannot be said that all payments made in due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to preferring one creditor to another. Actual knowledge of the insolvency of the bank on the part of the depositor at the time of withdrawing his deposit, does not constitute the transaction an unlawful preference, if the depositor does nothing more than draw his check and receive payment over the counter in the usual course of business."

tors of a bank, having knowledge of the approaching insolvency of the bank, gave the information to a corporation of which he was president, and the corporation thereupon withdrew its deposit by means of a check, there was no unlawful preference and the corporation was entitled to retain the amount withdrawn.⁵⁵

But when a depositor, with knowledge of the bank's insolvency, or reason to suspect that such a condition exists, by collusion with the officers of the bank, receives payment of his check, not in the usual course of business, and under such circumstances that the payment gives him an intentional preference over other creditors, there is a fraud upon the other creditors and the depositor will be required to refund the amount withdrawn and share with the other depositors in the assets of the bank.⁵⁶

§169. Order in which Checks should be Paid.—Checks are to be paid by the bank on which they are drawn in the order in which they are received, without reference to the dates on which they were drawn. The presentment of a check for payment fixes the rights of the parties and the drawee bank is not entitled thereafter to pay other checks or demands in preference to the one presented.⁵⁷

Where a number of checks variously dated are presented to a bank simultaneously through the clearing house and the aggregate amount of the checks is greater than the amount of the deposit against which they are drawn, the bank is bound to pay the checks to the extent of the amount on deposit. In applying the deposit to the payment of such checks it is optional with the bank which checks it will pay and which it will leave unpaid, if there is no rule of the clearing house or custom of the banking community to the contrary.⁵⁸ In the Pennsylvania decision in which this conclusion was reached it was in-

55. *O'Brien v. East River Bridge Co.*, 161 N. Y. 539, 56 N. E. Rep. 74.

56. *McGregor v. Battle*, 128 Ga. 577, 58 S. E. Rep. 28. See also *James Clark Co. v. Colton*, 91 Md. 195, 46 Atl. Rep. 386; *Swentzel v. Penn Bank*, 147 Pa. St. 140, 23 Atl. Rep. 405.

57. *Gilliam v. Merchants' Nat. Bank*, 78 Ill. App. 592; *Clark v. Chicago Title & Trust Co.*, 85 Ill. App. 293, Aff'd., 186 Ill. 440, 57 N. E. Rep. 1061; *Jacobson v. Bank of Commerce*, 66 Ill. App. 470; *National Safe & Lock Co. v. People*, 50 Ill. App. 336; *Dykens v. The Leather Manufacturers' Bank*, 11 Paige (N. Y.) 612.

58. *Reinisch v. Consolidated Nat. Bank*, 45 Pa. Super. Ct. 236.

timated that the correct procedure in such a case is to select and pay the largest number of checks presented that can be paid with the balance on hand. The basis of this practice is that the credit of the depositor will be less hurt by the rejection of a few checks even if their respective amounts be larger, than by dishonor of a large number of checks aggregating the same amount.⁵⁹

The rule that checks should be paid in the order in which they are presented applies to a memorandum check. Where a bank pays a check marked with the word memorandum, or an abbreviation thereof, thereby exhausting the deposit of the drawer, the holders of other checks not so marked presented later during the same day have no legal claim against the bank if their checks are not paid.⁶⁰

§170. Payment of Check where Deposit Insufficient.—When a check is presented for payment to the bank on which it is drawn and the drawer's account is insufficient in amount to pay the check, the proper course for the bank to pursue is to refuse to honor the check on the ground of insufficient funds; unless for some reason the bank desires to preserve the credit of its customer by paying the check in full and charging the excess against his account as an over draft. The bank is under no obligation in such circumstances to apply the deposit to the payment of the check so far as it will go or to credit the amount of the deposit to the holder of the check. The reason for this is that, upon payment, the bank is entitled to the check as a voucher or receipt, and the holder is usually unwilling to surrender his check until he has received payment in full.⁶¹ In

59. *Reinisch v. Consolidated Nat. Bank*, 45 Pa. Super. Ct. 236. The court said: "Had the defendant chosen to take up the checks in the order of their date and pay them as far as the plaintiff's money would go, who could complain of such action. As we have already seen the holders of the checks not paid would have no standing at all to demand anything from the bank, nor could they be legally injured by its action. And the depositor would in vain attempt to say that he had been injured, because each check which the defendant would have paid would have been a lawful demand by the depositor for so much money, and the payment of such checks would satisfy the most rigid interpretation of the bank's obligation."

60. *Dykers v. Leather Mfrs. Bank*, 11 Paige (N. Y.) 612.

61. *In re Brown*, 2 Story (U. S.) 502, Fed. Cas. No. 1985.

It is held that a drawee bank may refuse to pay a check if there are not sufficient funds to the credit of the depositor after deducting any indebted-

a case of this kind, however, the bank may, if it wishes, credit the amount of the deposit against the check,⁶² but if it does so it is entitled to take up the check as evidence of the payment which it has made.⁶³

In a Pennsylvania case it was held that, if the deposit is less than the amount of the check presented against it, the bank may permit the holder to deposit an amount sufficient to make the check good and then pay it.⁶⁴ But in England it has been held that, when a check is larger in amount than the account against which it is drawn, the bank is not obliged, nor in fact has it any right, to disclose the amount of the deficiency so as to enable the holder to deposit such amount to the credit of the drawer for the purpose of having the check paid in full.⁶⁵ In an English case a depositor sued his bank for a balance standing to his credit which had been paid out to the holder of a check, the bank first having advised the holder of the additional sum necessary to make the check good, which the holder thereupon deposited. It was held, that the bank had no right to make such disclosure and that it was liable to the depositor for the

ness due from the depositor to the bank. *Mt. Sterling National Bank v. Greene*, 99 Ky. 262, 35 S. W. Rep. 911.

In the case of *Harrington v. First Nat. Bank*, 85 Ill. App. 212 it was said: "A bank is not obliged to make a partial payment upon a check exceeding the funds in the bank subject to check. This is a rule for the protection of the bank, which is entitled to take up the check as evidence of its payment but if the check holder will surrender the check for the lesser amount in the bank, the reason of the rule is satisfied and the bank is protected."

62. *Dana v. Third Nat. Bank*, 13 Allen (Mass.) 445.

In *Bromley v. Commercial Nat. Bank*, 9 Phila. (Pa.) 522, it was said: "In such a case, if the holder of the check is willing to receive the smaller sum, as the bank is entitled to retain the check as evidence of payment and of the holder's right to receive the money, it should indorse the amount of its payment on the check, and issue to the holder a certificate of having received the check from him, and having paid so much on account for it. In this case the plaintiff offered to deposit to the credit of the drawee a sufficient sum of money to make the check good, if the bank would pay to him the amount of the check so made good. This was all that the bank in reason could ask and would have been a sufficient protection to it from any demand which the drawer could make for the money."

63. *Harrington v. First Nat. Bank*, 85 Ill. App. 212.

64. *Bromley v. Commercial Nat. Bank*, 9 Phila. (Pa.) 522.

65. *Hardy v. Veasey*, 3 L. R. Ex. (Eng.) 107; *Foster v. Bank of London*, 3 F. & F. (Eng.) 214.

amount on deposit to his credit before the payment of the check.⁶⁶

In those states, such as Illinois and Nebraska, which, prior to the adoption of the Negotiable Instruments Law, held that a check operated as an assignment, giving to the holder a right of action against the bank, it was held that no assignment was worked where the check was for an amount greater than the amount on deposit and that the check gave the holder no rights in the fund.⁶⁷

§171. Payment of Checks of Insane Persons.—The insanity of a depositor revokes the authority of the bank to pay the check, but payment of the check of an insane person without notice of the insanity does not subject the bank to liability; that is to say, if a depositor in a bank, after opening an account, becomes insane and draws checks while insane, or if he draws checks while sane and becomes insane before the checks are presented, the drawee bank is protected, in either case, if it pays the check in good faith and in ignorance of the drawer's insanity.⁶⁸ Unless there are facts present, putting the bank on notice, it is under no obligation to investigate or assure itself of the drawer's sanity. The fact that the drawer is advanced in years or is uneducated, does not impose upon the bank any duty of making inquiry as to his mental capacity.⁶⁹

While the rule just stated seems to be founded in fairness, there is authority to the effect that a check drawn by an insane person is absolutely void and that the drawee bank is not protected in paying the check, even though the payment is made without notice of the drawer's mental incapacity.⁷⁰ This doctrine is based upon the well settled principle that every contract presupposes that it is founded in the free and voluntary consent of each of the contracting parties. Applying this principle, it is held that a bank check, like any other contract

66. *Foster v. Bank of London*, 3 F. & F. (Eng.) 214.

67. *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. Rep. 1029; *Coates v. Preston*, 105 Ill. 470; *Pabst Brewing Co. v. Reeves*, 42 Ill. App. 154; *Jacobson v. Bank of Commerce*, 66 Ill. App. 470; *Henderson & Co. v. United States Nat. Bank*, 59 Neb. 280, 80 N. W. Rep. 898.

68. *Drew v. Nunn*, L. R. 4, Q. B. Div. (Eng.) 661; *Riley v. Albany Savings Bank*, 36 Hun. (N. Y.) 513.

69. *Riley v. Albany Sav. Bank*, 36 Hun. (N. Y.) 513.

70. *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. Rep. 182.

entered into by any insane person, is utterly void, and that no person can gain any rights thereunder.⁷¹

§172. Revocation of Check by Drawer's Death or Insolvency.

—It is frequently said in general terms that the death of the drawer of a check before its payment or certification by the drawee bank revokes the bank's authority to pay the check,⁷² and that a drawee bank, paying such a check after having had notice of the death of the drawer, acts at its peril.⁷³

The cases in which this rule is applied usually involve an attempted gift of a check by the drawer to the payee, and the death of the drawer prior to its presentment to the drawee bank. Under such circumstances, if the payee presents the check after the drawer's death and payment is refused, it is held that, he cannot maintain an action against the drawee bank for the amount of the check.⁷⁴ And, if a drawee bank pays a check delivered by the drawer to the payee as a gift, which is not presented until after the death of the drawer, the bank, having knowledge of the drawer's death, will be held liable for the amount to the drawer's estate.⁷⁵ While cases of this kind state that the death of the drawer revokes the authority of the bank to pay the check, the conclusion which they

71. *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. Rep. 182.

72. *Tate v. Hilbert*, 2 Vesey, Jr., (Eng.) 111; *National Commercial Bank v. Miller*, 77 Ala. 168; *Pullen v. Placer County Bank*, 138 Cal. 169; *Weiand's Adm'r., v. State Nat. Bank*, 112 Ky. 310, 65 S. W. Rep. 617; *Saylor v. Bushong*, 100 Pa. 23; *Simmons v. Society*, 31 Ohio St., 457; *Second Nat. Bank v. Williams*, 13 Mich. 282.

It was provided by statute in Massachusetts, Act of May 4th, 1885, that a drawee bank may pay a check notwithstanding the death of the drawer, provided the check is presented for payment within ten days after its date.

73. *Weiand's Adm'r. v. State Nat. Bank*, 112 Ky. 310, 65 S. W. Rep. 617.

74. *Simmons v. Society*, 31 Ohio St. 457; *Tate v. Hilbert* 2 Vesey, Jr., (Eng.) 111.

In *Second National Bank v. Williams*, 13 Mich. 282, it appeared that a check was delivered by the drawer to the payee during the last illness of the drawer with instructions to defray the funeral expenses of the drawer and pay the balance to his heirs. It was held that, the payee could not maintain an action against the drawee upon the drawee's refusal to pay after the drawer's death.

75. *Pullen v. Placer County Bank*, 138 Cal. 169, 71 Pac. Rep. 83.

reach is based also upon the ground that the attempted gift is incomplete until the check is paid or certified by the drawee and that the death of the drawer before the payment or certification of the check, renders the gift incapable of completion.

Where a check is delivered for a valid consideration, as where it is given in payment of a debt, there seems to be no reasonable ground upon which to hold that the death of the drawer prior to the presentment of the check revokes it to such an extent that the drawee will be liable for the amount to the estate of the drawer if it pays the check after notice of the drawer's death. Nevertheless, a bank is justified in refusing to pay a depositor's check, after it has received notice of his death, and in view of the uncertainty as to the bank's liability in such a case, the only safe course for it to pursue is to refuse payment.

It has been held in a case where a check was deemed to operate as an assignment that the death of the drawer before its presentation did not revoke the check, and that the payee was entitled to recover thereon in an action against the drawee bank.⁷⁶ But the general adoption of the Negotiable Instruments Law, under which a check does not operate as an assignment, renders decisions such as this practically obsolete.⁷⁷

In this connection, there is one point upon which the law is well settled. If a drawee bank pays a check drawn upon it in the usual course of business and without notice of the death of the drawer, it will be protected in making such payment, irrespective of whether the check was delivered by way of gift or upon a valuable consideration, and the bank paying under such circumstances cannot be held liable for the amount of the check at the instance of the drawer's personal representative.⁷⁸

76. *Lewis v. International Bank*, 13 Mo. App. 202. Under the Negotiable Instruments Law a check no longer operates as an assignment in Missouri.

77. In the five states which have not adopted the uniform statute, namely, California, Georgia, Maine, Mississippi and Texas, it has been held by the courts of three (California, Georgia and Texas) that a check does not operate as an assignment. See, *supra*, §4, 5 and 6.

78. *Drum v. Benton*, 13 App. Cases (D. C.) 245; *Weiland's Adm'r. v. State Nat. Bank*, 112 Ky. 310, 65 S. W. Rep. 617; *Glennan v. Rochester Trust Co.*, 136 N. Y. Supp. 747; *Brennan v. Merchant's & Mfrs.' Nat. Bank*, 62 Mich. 343, 28 N. W. Rep. 881.

The death of the payee or indorser of a check after its negotiation does not restrict its further negotiation, and its payment by the drawee bank

In the absence of any statute on the subject the failure or bankruptcy of a person operates as a revocation of the authority of his bank to pay his outstanding uncertified checks, except in those states where a check is held to operate as an assignment; however, a bank which pays a check without notice of the drawer's failure or bankruptcy is protected.⁷⁹

§173. Agreement to Honor Checks.—It is not unusual for a bank to receive a deposit of money from one of its depositors upon an express understanding that the deposit will be held by the bank for the purpose of paying a particular check, or number of checks, either already issued, or about to be issued, by the depositor. Another banking arrangement frequently met with is where a bank agrees with its customer to honor his checks drawn for certain purposes, provided the customer delivers to the bank a draft and bill of lading representing the property purchased with the checks, and the proceeds of the transaction are collected by the bank prior to the presentment of the checks. If a bank has entered into a contract of this kind, it may find, when the checks in question are presented for payment, that the drawer of the checks is indebted to it and the bank may attempt to apply the deposit to the satisfaction of its claim. Proceedings in garnishment may be instituted against the depositor by a creditor of the depositor. In the event of such a contingency, the question arises as to the respective rights of the bank, the depositor, the garnishing creditor, and the check holders in the deposit.

Deposits of this kind are called specific deposits and in general the bank is held liable in accordance with the terms of the agreement entered into with the depositor, and the check holder for whose benefit the agreement was made is allowed to recover on the check in an action against the bank in the event of the

after the payee's death, does not render the bank liable to the payee's administrator. *Brennan v. Merchants' & Manufacturers' Nat. Bank*, 62 Mich. 343, 28 N. W. Rep. 881.

79. *Guthrie Nat. Bank v. Gill*, 6 Okla. 560; *Chambers v. Northern Bank of Kentucky*, 5 Ky. L. Rep. 123; *First Nat. Bank v. Selden*, 120 Fed. Rep. 212.

Where the drawer of a check makes an assignment for the benefit of the creditors before the check is presented for payment, the check holder has no rights in the deposit superior to those of the other creditors of the drawer. *LaCled Bank v. Schuler*, 120 U. S. 511.

As to when check operates as an assignment see, *supra*, §4, 5 and 6.

bank's refusing payment.⁸⁰ The right of the holder of a check in such a case, to maintain an action against the drawee bank on the check, comes within the rule, that a person may maintain an action on a contract made for his benefit, although he was not a party to the contract.⁸¹

Where a deposit is made in a bank for the purpose of paying particular checks, or where a bank undertakes to collect a draft and agrees to devote the proceeds thereof to the payment of certain checks, the bank cannot thereafter refuse to honor the checks and apply the fund in its possession to the payment of a claim which it may have against its customer, by reason of his overdraft or otherwise.⁸² Thus, where a bank agrees with a customer to honor checks drawn by him and delivered in pay-

80. *Nelson v. First Nat. Bank*, 48 Ill. 36; *Dolph v. Cross*, Ia., 133 N. W. Rep. 669; *Chanute Nat. Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. Rep. 575; *Falls City State Bank v. Wehrli*, 68 Neb. 75, 93 N. W. Rep. 994; *First Nat. Bank v. Barger*, Ky., 115 S. W. Rep. 726; *Ballard v. Home Nat. Bank*, Kan., 136 Pac. Rep. 935.

Nelson v. First Nat. Bank, 48 Ill. 36, is distinguished from the case of the *First Nat. Bank v. Pettit*, 41 Ill. 492, wherein the check holder was not permitted to recover on the ground that, in the latter case, the holder received the check without knowledge that the bank had entered into an agreement with the drawer to pay it; however, it has been expressly held that, where money is deposited with a bank for the particular purpose of paying certain specified checks, the holder of such checks may recover the amount thereof in an action against the drawee bank, although he had no knowledge of the arrangement between the bank and the drawer. *Ballard v. Home Nat. Bank*, Kan., 136 Pac. Rep. 935.

81. *Chanute Nat. Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. Rep. 575.

82. *Falls City State Bank v. Wehrli*, 68 Neb. 75, 93 N. W. Rep. 994; *Dolph v. Cross*, Ia., 133 N. W. Rep. 669; *Smith v. Sanborn State Bank*, Ia., 126 N. W. Rep. 779; *First Nat. Bank v. Barger*, Ky., 115 S. W. Rep. 726; *Continental & Commercial Bank v. Chicago Title & Trust Co.*, 199 Fed. Rep. 704; *Chanute Nat. Bank v. Crowell*, 6 Kan. App. 533, 51 Pac. Rep. 575.

The law is that, if a bank receives a general deposit from one who is indebted to it, the bank has the right to charge the depositor's account with such indebtedness; but if a bank receives a deposit with notice that it is made with the purpose of meeting outstanding checks drawn by the depositor, it has no right to charge the depositor's account with sums due it from the depositor, and thus prevent the persons holding the outstanding checks from collecting them. This rule applies only when the bank has notice of the previous appropriation of the sums deposited, or, in other words, that it is a special deposit to meet outstanding checks issued by the depositor. *First Nat. Bank v. Barger*, Ky., 115 S. W. Rep. 726.

ment of horses, the bank to be secured by a draft drawn by the customer and a bill of lading issued upon the shipment of the horses by him, the bank will be liable in an action by a holder of one of the checks in question, it having derived sufficient funds to pay the check from the collection of the draft, and it will not be allowed to appropriate the fund to the satisfaction of a claim it may have against the drawer.⁸³ And where a person deposits money in a bank, informing the bank that the deposit is for the particular purpose of meeting a check which he has issued, the right of the check holder, for whose benefit the deposit was made, is superior to that of a garnishing creditor of the depositor.⁸⁴

In determining the rights of the holder of a check issued under such circumstances, the question whether a check operates as an assignment is immaterial. The check holder does not base his action on the check alone. His claim is upon the check, supplemented by the bank's promise to pay it and supported by the carrying out of the conditions upon which the deposit was made.⁸⁵

A drawee bank cannot defend an action brought against it by the holder of a check, where it appears that the drawer has made a deposit of money for the particular purpose of paying the check, on the ground that such an arrangement constitutes a certification which the law requires to be in writing. An agreement by a bank to devote a deposit to the payment of certain checks is distinct from an agreement of certification and the two contracts are not to be confused.⁸⁶ The distinction is brought out in a Nebraska decision wherein it appeared that a bank advised the payee of a check by telephone, that it would be paid on presentment. The drawer subsequently withdrew his deposit, leaving in the bank, however, the exact amount of the check, and instructing the bank to pay the check in question. It was held that the statute requiring the certification of a check to be in writing did not apply under these

83. Falls City State Bank v. Wehrli, 68 Neb. 75, 93 N. W. Rep. 994.

84. Dolph v. Cross, Ia., 133 N. W. Rep. 669.

85. Dolph v. Cross, Ia., 133 N. W. Rep. 669; Ballard v. Home National Bank, Kan., 136 Pac. Rep. 935.

86. Bowen v. Needles Nat. Bank, 87 Fed. Rep. 430; Ballard v. Home Nat. Bank, Kan., 136 Pac. Rep. 935; Gruenther v. Bank of Monroe, Neb., 133 N. W. Rep. 402.

circumstances and that the bank was liable in an action by the holder of the check.⁸⁷

A national bank may enter into an agreement with a customer that it will honor his checks given in payment for livestock, provided the stock is sold and the proceeds deposited in the bank in time to meet the checks. The bank in such a case will not be permitted to refuse to honor the customer's checks and apply the money deposited pursuant to this arrangement to the payment of a previous obligation of the customer.⁸⁸ A national bank, however, will not be held liable on an agreement to pay checks drawn upon it by a certain person, where at the time of the presentment of the checks there are no funds in the bank applicable to their payment. In such a case, the bank is not certifying the customer's checks, nor is it accepting a deposit for a specific purpose; it is engaging in a contract of guaranty which is beyond its power, and which, therefore, cannot be enforced against it.⁸⁹

§174. Liability of Bank for Refusing to Honor Checks Drawn by Depositor.—A bank may arbitrarily select its customers, and its act in declining an account is not open to question. But, when it permits a person to open an ordinary checking account, it impliedly agrees to honor his checks, in proper form,

87. *Gruenther v. Bank of Monroe, Neb.*, 133 N.W. Rep. 402. In the opinion it was said: "If the case turned on the matter of the acceptance of the check, the provisions of section 9330, Ann. St. 1911, that the acceptance of a bill must be in writing in order to bind the drawee, might be applied, and the evidence of such acceptance would be wanting. But under the evidence that is not this case. There was evidence that after the conversation between plaintiff and defendant, which was by telephone, but before the check was presented, the drawer withdrew his deposit from the bank, but directed it to withhold the sum of \$129.60 to meet and pay a check for that sum which he had given, and which was done. This would obviate the application of the statute above referred to, as well as other cited sections upon the same or cognate subjects."

88. *Ballard v. Home Nat. Bank, Kan.*, 136 Pac. Rep. 935; where the court said: "It is suggested that the making of such an agreement was beyond the power of the president of a national bank, or of the bank itself. The contract was not immoral or forbidden, and, even if when made it was invalid for want of capacity on the part of the officer or of the bank, it was so far carried out that a defence on that ground cannot successfully be interposed."

89. *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430.

and properly indorsed and presented, so long as there are funds on deposit to the credit of the depositor sufficient in amount to pay the checks. If the bank, without just cause, refuses to honor a check drawn by one of its depositors, it becomes liable to the depositor, for such damages as naturally arise from the dishonor of the check.⁹⁰ The fact that the holder of a check may have a right of action against the bank for dishonoring the check does not deprive the drawer of his action for damages.⁹¹ In order to establish the liability of a bank for a failure to honor a depositor's check it must appear that the check was presented at the proper time and place, and properly indorsed by the payee, or other holder, where such indorsement is necessary to a transfer of the check.⁹²

A bank which discounts for a customer the note of a third party and places the proceeds to his credit cannot on the non-payment of the note at maturity, charge the note back to his account, until after it has taken steps to charge the customer as indorser upon the note; if, without taking such steps, it charges the note to the customer's account and refuses to honor checks drawn upon it by the customer, it is liable to the latter.⁹³

A bank will not be permitted to decline payment on the ground that an unlawful use is to be made of the money. Its undertaking is to honor its customer's orders so long as he has sufficient funds in the bank; subject to certain limitations, for the protection of the bank against spurious orders, the funds are intended and understood to be as much under the control of the depositor as though they were in his own safe. Thus, a bank may not refuse to honor a check merely because it knows that the check was given in settlement of an election bet, made contrary to law.⁹⁴

In order to hold a bank in damages for refusing to honor a check drawn on it, it must appear that the relation of banker

90. *Jaselli v. Riggs Nat. Bank*, 36 App. D. C. 159; *Kleopfer v. First Nat. Bank*, 65 Kan. 774, 70 Pac. Rep. 880; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. Rep. 655; *Dycus v. Commonwealth Nat. Bank, Tex.*, 148 S. W. Rep. 1127.

91. *National Bank of Lebanon v. Boles*, 12 Ky. L. Rep. 422.

92. *Harden v. Birmingham Trust Co.*, 1 Ala. App. 610, 55 So. Rep. 943.

93. *Davis v. Standard Nat. Bank*, 50 N. Y. App. Div. 210, 63 N. Y. Supp. 764.

94. *McCord v. California Nat. Bank*, 96 Cal. 197, 31 Pac. Rep. 51.

and depositor exists. The mere fact that there are funds in the hands of a bank, belonging to a certain person, as where a bank holds money to which a contractor is entitled for work done by him, does not entitle such person to draw checks on the bank and does not render the bank liable for a refusal to pay the checks so drawn.⁹⁵

A bank which refuses to pay upon the depositor's own demand is not liable in damages in an action by the depositor for slandering his credit, as such action is a private matter between the bank and the depositor, to which no publicity or injury to the reputation would necessarily attach.⁹⁶

§175. Liability of Bank to Depositor Where it Refuses to Honor Check through Mistake.—A bank may be held in damages for the failure to honor one of its depositor's checks, even though the bank's refusal was due to an honest mistake, such as an error in bookkeeping through which the bank was led to believe that the account was not sufficient to pay the check when, in fact, the check was drawn against sufficient funds.⁹⁷ So, where a bank refused to honor a depositor's check, claim-

95. *McNight v. Bank of Arcadia*, 114 La. 289, 38 So. Rep. 172.

Damages for Refusal to Honor Check Against Special Deposit. Where a bank loaned money on mortgage, with an agreement that the money should remain in the bank and be paid out only on a note due the bank, or for certain other specified purposes, the deposit was special and the bank was not liable in damages for refusing to honor a check drawn for the purpose of transferring the deposit to drawer's general account in another bank. *Stephens v. Chehalis Nat. Bank*, Wash., 141 Pac. Rep. 340.

96. *Hanna v. Drovers' Nat. Bank*, 194 Ill. 252, 62 N. E. Rep. 556; See also *First Nat. Bank v. Wheatley*, Neb., 139 N. W. Rep. 673.

97. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S.E. Rep. 190; *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. Rep. 917; *Levin v. Commercial Germania Trust & Savings Bank*, La., 63 So. Rep. 601; *First Nat. Bank v. Railsback*, 58 Neb. 248; *Birchall v. Third Nat. Bank*, Pa., 15 Wkly. Notes Cas. 174; *Marzetti v. Williams*, 1 Barn. & Ad. (Eng.) 415; *Rolin v. Steward*, 14 C. B. (Eng.) 595.

Where a bank refused to pay checks drawn by one of its depositors on the ground that the signatures of the checks were not in the form which had previously been agreed upon between the bank and the depositor, it was held, that the bank was liable for damages although it acted entirely without malice, it appearing that previous checks drawn by the same depositor had been signed in the same form as those which the bank had refused to pay. *Reeves v. First Nat. Bank*, Cal., 129 Pac. Rep. 800.

ing that her funds were deposited in the savings department of the bank and could not be paid except on presentment of the pass book, which was a mistake, the depositor was held entitled to damages.⁹⁸ And where a bank set aside funds to meet a postdated check drawn by one of its depositors, and then refused to pay checks subsequently drawn by the same depositor which checks would have been paid if the money had not been set aside for the payment of the post-dated check, the bank was held liable in damages to the depositor.⁹⁹

Damages are allowed against a bank in such cases on the ground that where a bank, through error, refuses to pay a depositor's check the consequences to the depositor are the same as though the bank had acted with malice. A bank will not be permitted to turn back a check with a badge of dishonor upon it and then protect itself by saying, in effect, that this was due to its own carelessness.¹ The fact, however, that the dishonor of the check was the result of an error in bookkeeping, and that the bank on the discovery of the error attempted to repair the injury occasioned by its mistake, are circumstances that may be considered in mitigation of damages.²

§176. Where Bank May Be Justified in Refusing to Honor Depositor's Check.—In England, and under some of the decisions in this country, the rule seems to be that a mere notice to a bank from a third party that he claims the balance standing to the credit of a depositor will not justify the bank in dishonoring a check drawn by the depositor.³ These cases hold that, where a bank receives money from a person, and gives him credit therefor, it is in duty bound to honor his checks to the amount of such deposit, and it cannot refuse to honor his checks or drafts against the fund on the ground that the money deposited belongs to some other person, or that the title of the depositor to it is defective. These are matters in which the bank is not

98. *Lorick v. Palmetto Bank & Trust Co.*, 74 S. C. 185; 54 S. E. Rep. 206.

99. *Smith v. Maddox-Rucker Banking Co.*, 8 Ga. App. 288, 68 S. E. Rep. 1092.

1. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334.

2. *Spearing v. Whitney-Central Nat. Bank, La.*, 56 So. Rep. 548.

3. *Tassell v. Cooper*, 9 C. B. (Eng.) 509; *Nehawka Bank v. Ingersoll*, 2 Neb. (Unoff.) 617, 89 N. W. Rep. 618.

interested or concerned until the third party who claims to own the fund proceeds to enforce his rights.⁴

The weight of authority, however, in this country, is to the effect that, where notice is given the bank that the money standing to the depositor's credit belongs to another, the bank will be justified in withholding payment of checks drawn by the depositor.⁵ Nevertheless, when a deposit is claimed by some person other than the depositor, the bank should satisfy itself that there is some real foundation for the claim before it refuses to honor its depositor's checks. The bank should exercise diligence in notifying its customer of the adverse claim, and of its intention to protect itself by retaining out of the amount standing to his credit a sum sufficient to meet that claim; and negligence in that regard, resulting in injury to its depositor, will render the bank liable. The bank is not justified, upon the notice of a third party, in dishonoring its customer's checks, unless it has exercised diligence in notifying him of its intention to do so, or, of course, unless it subsequently develops that the deposit had been wrongfully acquired and was in fact the property of the third party.⁶ Of course, the bank is always protected when the deposit is attached or garnishment proceedings are taken against it.⁷

A bank which holds a depositor's past due note may hold out of the funds on deposit a sum sufficient to pay the note, even if doing so necessitates dishonoring checks drawn by the depositor. And in such case the bank is not liable in damages to the depositor.⁸ It is even held that, where a depositor becomes insolvent and owes his bank upon promissory notes, not yet matured, the bank has a right to apply his balance on deposit to their payment, and to refuse payment of its depositor's checks, thereafter presented, drawn against such de-

4. *Nehawka Bank v. Ingersoll*, 2 Neb. (Unoff.) 617, 89 N. W. Rep. 618.

5. *Jaselli v. Riggs Nat. Bank*, 36 App. D. C. 159; *Hanna v. Drovers' Nat. Bank*, 194 Ill. 252, 62 N. E. Rep. 556; *McEwen v. Davis*, 39 Ind. 109; *Arnold v. Macungie Savings Bank*, 71 Pa. 287; *First Nat. Bank v. Bache*, 71 Pa. 213.

6. *Jaselli v. Riggs Nat. Bank*, 36 App. D. C. 159.

7. *Citizens' Nat. Bank, v. Alexander*, 120 Pa. 476, 14 Atl. Rep. 402.

8. *Mount Sterling Nat. Bank v. Green*, Ky., 35 S. W. Rep. 911; *Ehlermann v. St. Louis Nat. Bank*, 14 Mo. App. 591.

posit. The bank, being within its rights, is not liable to the depositor for damages for injury to his credit.⁹

§177. Measure of Damages for Refusing to Honor Check.—

Where a bank refuses to honor a depositor's check, without legal cause, he is entitled to recover substantial damages,¹⁰ even though the refusal is due to an honest mistake on the part of the bank,¹¹ and there is no evidence of special damage or actual malice.¹²

In New York it is held that the measure of damages which a bank must pay for wrongful refusal to pay its depositor's checks is nominal only, unless the depositor alleges and proves special damage, or unless the bank is shown to be guilty of malice.¹³ And the damages, to be recoverable, must be such as naturally arose from the bank's refusal to pay.¹⁴ In New York it is also

9. *Owens v. American Nat. Bank*, 36 Tex. Civ. App. 490, 81 S. W. Rep. 988; *Contra, Skunk v. Merchants' Nat. Bank*, 16 Wkly. Law Bul. 353, 9 Ohio Dec. 684.

A depositor has a right of action against his bank for refusal to pay a check by him in favor of a third party, when he has deposited funds with the bank sufficient to meet payment, notwithstanding the bank has applied such funds in extinguishment of past due claims held against him by the bank, where such application has been made without the consent of, or previous notice to, the depositor. *Callahan v. Bank of Anderson*, 69 S. C. 374, 48 S. E. Rep. 293.

10. *American Nat. Bank v. Morey*, 25 Ky. L. Rep. 2151, 80 S. W. Rep. 157; *Commercial Nat. Bank v. Latham*, 29 Okla. 88, 116 Pac. Rep. 197; *Patterson v. Marine Nat. Bank*, 130 Pa. St. 419, 18 Atl. Rep. 632; *Birchall v. Third Nat. Bank*, 15 Wkly. Notes (Pa.) 174; *Svensen v. State Bank*, 64 Minn. 40, 65 N. W. Rep. 1086; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. Rep. 190; *Siminoff v. Goodman & Co., Cal.*, 121 Pac. Rep. 939.

The depositor's right to recover is not limited by Section 3302 of California Code, which provides that "the detriment caused by the breach of an obligation to pay the money is deemed to be the amount due by the terms of the obligation, with interest thereon." *Siminoff v. Goodman Co., Cal.*, 121 Pac. Rep. 939.

11. *Schaffner v. Ehrman*, 37 Ill. App. 340, Aff'd., 139 Ill. 109, 28 N. E. Rep. 917; *Levin v. Commercial Germania Trust & Sav. Bank, La.*, 63 So. Rep. 601.

12. *Schaffner v. Ehrman*, 37 Ill. App. Aff'd., 139 Ill. 109, 28 N. E. Rep. 917; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. Rep. 190.

13. *Citizens' Nat. Bank v. Importers' etc., Bank*, 119 N. Y. 195; *Clark Co. v. Mount Morris Bank*, 85 N. Y. App. Div. 362; *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun. (N. Y.) 6.

14. *Brooke v. Tradesmen's Nat. Bank*, 69 Hun. (N. Y.) 202.

held that the action may be brought in tort, founded upon malice upon the part of the bank, or it may be based upon the bank's breach of contract in refusing to pay the check. There is a considerable distinction, so far as the rule of damages is concerned, between an action brought merely for the breach of a contract, and those founded upon tort. Where one sues to recover for the breach of a contract, the measure of damages is usually such an amount only as will repay him for the money loss which he has suffered because of the failure of the bank to do as it agreed. In actions of that nature injuries to the feelings are not considered. It is assumed in such actions that where one has been repaid the sum of money which he lost because of the failure to perform the contract, he is in precisely the same situation as if the contract had been performed, and, therefore, he is not entitled to further damages. But an action for tort not only involves a violation of the duty which the bank owes the depositor, but may also be based upon a malicious and wrongful act of the bank; in such a case the jury is entitled to consider not only the actual money damages, but such other damages as necessarily arise out of the fact, and may even award damages for mental suffering and anxiety caused by the dishonor of the check.¹⁵

In many of the cases no point seems to be made of the occupation in which the depositor is engaged. But by the weight of authority, if the depositor is a merchant or trader, it will be presumed, without further proof, that substantial damages are sustained, and such damages may be recovered; if he is not a merchant or trader, there is no such presumption, and where the act of the bank is without malice, and simply the result of a clerical error, he is entitled to recover only nominal damages, unless special damages are alleged and proved.¹⁶ Recovery in these cases is allowed on the theory that the rejection by a bank of a check drawn upon it by a customer brings discredit to the drawer, not only with the person presenting it, but necessarily with all persons who are informed of the fact.

15. *Davis v. Standard Nat. Bank*, 50 N. Y. App. Div. 210, 63 N. Y. Supp. 764; *Clark Co. v. Mount Morris Bank*, 85 N. Y. App. Div. 362.

16. *Third Nat. Bank v. Ober*, 178 Fed. Rep. 678; *Levin v. Commercial Germania Trust & Savings Bank, La.*, 63 So. Rep. 601; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. Rep. 655; *Svensden v. State Bank*, 64 Minn. 40, 65 N. W. Rep. 1086, *J. M. James Co. v. Bank*, 105 Tenn. 1.

And if this customer is a merchant, or trader, its natural effect is an injury to his business standing. The ability of a trader to borrow money usually depends on the belief of the lender that the debt will be paid, and whatever tends to lower the financial standing of the borrower impairs his financial credit in the market. When checks given by him to his creditors are not paid upon presentation to his bankers, his financial standing, in the absence of satisfactory explanation, usually becomes impaired, and if not retrieved it may cause loss of customers, and finally ruin his business, with which may be associated a valuable right of good will.¹⁷

A Pennsylvania decision¹⁸ has placed the right to recover more than nominal damages, where a bank refuses to honor the check of a depositor who is a merchant or trader, upon the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the bank in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business.¹⁹

Where, after the refusal of a bank to honor the check of a depositor, the latter is arrested at the instance of a third party, the bank is not liable for false arrest, since the arrest is not the proximate result of the dishonor of the check.²⁰

Where the depositor does not come within the class designated as merchant or trader, it is frequently held that he is limited to nominal damages for the wrongful dishonor of his check, unless he alleges and proves special damage.²¹ But, it has been held, in an action by a physician against a bank for the wrongful dishonor of his check, that the plaintiff was not confined to the recovery of nominal damages, but could recover substantial damages, without showing any special damage suffered by him as a result of the bank's refusal to pay his check.²²

17. *J. M. James Co. v. Bank*, 105 Tenn. 1. *Robinson v. Wiley*, 188 Mass. 533, 74 N. E. Rep. 923.

18. *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 18 Atl. Rep. 632.

19. *Svendsen v. State Bank*, 64 Minn. 40, 65 N. W. Rep. 1086.

20. *Western Nat. Bank v. White*, Tex., 131 S. W. Rep. 828, See also *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. Rep. 84, 23 L.R.A. 190.

21. *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. Rep. 655; *Third Nat. Bank v. Ober*, 178 Fed. Rep. 678; *Spearing v. Whitney-Central Nat. Bank*, La., 56 So. Rep. 548.

22. *Columbia Nat. Bank v. MacKnight*, 29 App. D. C. 580.

CHAPTER XIII.

STOPPING PAYMENT.

§178. Right of Drawer to Stop Payment.

§179. Right of Payee to Stop Payment

§180. How Payment May Be Stopped.

§181. Right of Bank to Recover Money Paid on Stopped Check.

§182. Effect of Rule in Pass Book as to Stopping Payment.

§183. Stopping Payment as against Holder in Due Course.

§184. Stopping Payment where Check Operates as an Assignment.

§178. Right of Drawer to Stop Payment.—A check, being a mere order on a bank to pay money from the drawer's account is subject to revocation by the drawer at any time before it is accepted or paid. If, after issuing a check, the drawer decides to recall it, it is his privilege to notify the drawee not to pay it and the bank is bound to carry out his instruction, provided the notice is received before the check has been accepted or paid. In general, if a bank pays a check after it has been notified to stop payment, it pays on its own responsibility and will not be permitted to charge the amount of the check against the depositor's account.¹

1. *People's Savings Bank v. Lacey*, 146 Ala. 688, 40 So. Rep. 346; *Weiland's Admr. v. State Nat. Bank*, 112 Ky. 310, 65 S. W. Rep. 617; *Albers v. Commercial Bank*, 85 Mo. 173; *Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221; *Dykers v. Leather Mfrs. Bank*, 11 Paige (N. Y.) 612; *Schneider v. Irving Bank*, 1 Daly (N. Y.) 500, 30 How. Pr. (N. Y.) 190; *Elder v. Franklin National Bank*, 25 Misc. Rep. (N. Y.) 716, 55 N. Y.-Supp. 576; *First Nat. Bank v. School District*, Okla. 120 Pac. Rep. 614; *German Nat. Bank v. Farmers' Deposit Nat. Bank*, 118 Pa. 294, 12 Atl. Rep. 303; *Saylor v. Bushong*, 100 Pa. 23; *Pease & Dwyer v. State Nat. Bank* 114 Tenn. 693, 88 S. W. Rep. 172.

"I presume no one at this day questions the right of the drawer of a check to stop the payment thereof. This is usually done by notice to the bank upon which the check is drawn. If the bank pays after such

But, while the drawer of a check, may stop payment thereof, as between himself and the bank, such an order cannot discharge the liability of the drawer to the payee or to one holding under him. Where payment has been stopped the relation between the drawer and the payee, or other holder, becomes the same as if the check had been dishonored and notice thereof given to the drawer, and the drawer's situation is like that of the maker of a promissory note.²

The right to stop payment of a certified check has been discussed in another place.³

§179 Right of Payee to Stop Payment.—Ordinarily, if the payee of a check wishes to stop payment, he should do so through the drawer, for the drawee bank is under a contractual obligation to the drawer to pay his checks when properly drawn and presented, and is under no obligation whatever to the payee. While a drawee bank should not totally ignore a stop payment order given by the payee of a check, it should insist that the payee show good reason for making the request and the bank should be satisfied that in carrying out the payee's order it is not involving itself in liability to the drawer. When an order to stop payment is received from the payee of a check, the bank should take immediate steps to communicate with its depositor, the drawer, and if it withholds payment on the payee's order it should explain its reason for refusing payment to the party by whom the check is presented, so that its refusal will not in any way reflect upon the credit of the drawer. It has been held that the payee of a check may stop its payment, at least in a case where the check has been transferred without the payee's indorsement and that, even though a notice to stop payment is not binding, because not given by the proper party, it is sufficient to put the bank upon inquiry as to the equities against the check in the hands of the holder, and that the bank

notice it does so at its peril. The holder of a check has no remedy against a bank upon which a check is drawn for its refusal to pay it. He must look to the drawer. The right to stop payment ceases of course with actual payment." *German Nat. Bank v. Farmers' Dep. Nat. Bank*, 118 Pa. St. 294, 12 Atl. Rep. 303.

As to effect of drawer's death, see, *supra*, §172.

2. *Usher v. A. S. Tucker Co.*, Mass., 105 N. E. Rep. 360; *Bank of Venice v. Clapp*, 17 Cal. App. 657, 121 Pac. Rep. 298.

3. See, *infra*, §240.

should not honor the check under such circumstances without making such investigation as ordinary prudence would dictate.⁴

§180. How Payment May Be Stopped.—To be effective, a notice to stop payment must, of course, be received by the bank before the check has been paid,⁵ or certified.⁶ In a case where checks were delivered by the payee to the cashier of the drawee bank, after banking hours at a place away from the bank, for the purpose of being credited to the payee's account, and the drawee notified the cashier and assistant cashier before the bank opened for business on the next day not to pay the checks, it was held that the notice was given in sufficient time and was binding on the bank.⁷

It is not unusual for a bank to enact and enforce a rule to the effect that stop orders must be written, but in the absence of such rule the notice may be given in writing or verbally.⁸ While a telegram, directing that payment of a check be stopped, may be acted upon by a bank, at least to the extent of postponing the honoring of the check until further inquiry can be made, the bank is not bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing payment.⁹

The order to stop payment must describe the check in question accurately. This point was brought out in a recent New York decision where it appeared that the drawer notified the bank not to pay a check for the sum of \$196.76, dated December 21st and payable to the order of a designated firm. The bank subsequently paid a check for \$196.75, dated December 23rd and payable to the order of bearer. In an action against the bank, the drawer contended that the check paid by the bank was the one on which he stopped payment, but it was held that the notice to the bank to stop payment did not describe the check with sufficient accuracy to render the bank liable.¹⁰

4. *Public Grain & Stock Exchange v. Kune*, 20 Ill. App. 137.

5. *Brandt v. Public Bank*, 139 N. Y. App. Div. 173, 123 N. Y. Supp. 807.

6. As to the right to stop payment of a certified check, see *infra*, §240.

7. *Kellogg v. Citizens' Bank, Mo.*, 162 S. W. Rep. 643.

8. *People's Savings Bank & Trust Co. v. Lacey*, 146 Ala. 688, 40 So. Rep. 346.

9. *Curtice v. London City and Midland Bank*, 98 L.T.N.S. (Eng.) 190.

10. *Mitchell v. Security Bank*, 147 N. Y. Supp. 470.

§181. Right of Bank to Recover Money Paid on Stopped Check.

—A bank which pays a check after the drawer has directed that payment be stopped, is not only precluded from charging the amount of the check against the account of the depositor, but it is not permitted to recover the amount from the party to whom the payment was made, where such party was a bona fide holder of the instrument.¹¹ This holding is placed upon the ground that, as between the holder of the check and the drawee bank, the latter is bound to know the state of the depositor's account. Before paying the check it must assure itself that the payment has not been revoked. When the bank pays the check to a bona fide holder, who has no notice of any infirmity in the check, it finally exercises its option to pay or not to pay and the transaction is closed as between the parties to the payment.

§182. Effect of Rule in Pass Book as to Stopping Payment.—

It is not unusual to have placed in pass books issued by banks a statement to the effect that the bank shall not be liable to the depositor for a neglect to execute a stop payment order, but it has been held that a bank renders itself liable where it pays a check contrary to the depositor's order, notwithstanding such a provision in the pass book.

In one case the pass book of a depositor contained a printed stipulation "that the bank shall not be responsible for the execution of an order to stop payment of a check previously drawn; that the bank will endeavor to execute such orders, but that no liability shall be created by a failure so to do, and that no rule, usage or custom shall be construed to create such liability." It was held that this clause did not absolve the bank from the duty of exercising ordinary care and that it was liable to a customer, who had ordered payment of a check to be stopped, which order had been entered in the books of the bank, where

11. *National Bank of New Jersey v. Berrall*, 70 N. J. Law 757, 58 Atl. Rep. 189.

In *Northampton Nat. Bank v. Smith*, 169 Mass. 281, it was held that, where a bank pays a check after payment has been stopped by the drawer, the bank must tender the check to the payee before it can bring an action against the payee for the money thus paid; whether such an action could be maintained after tendering the check was not passed upon by the court.

the bank paid the check through an oversight when the check came in through the clearing house.¹²

Agreements of this kind are in derogation of the common law and they are strictly construed against the parties who frame them. It will be observed that the agreement in this case did not declare unconditionally that the bank would not execute a depositor's order to stop payment, but it invited the assent of its depositors to the engagement by agreement that it would endeavor to execute such orders. A fair construction of the agreement was that the bank should not be liable when it paid in good faith a check, payment of which had been stopped, unless it failed properly to fulfil its agreement to endeavor to comply with the depositor's direction. The agreement necessarily imported the exercise of at least reasonable care by the bank.¹³

No doubt a rule could be so worded as to absolve the bank from liability in case it overlooked an order to stop payment. But it would have to be expressed in such clear and unambiguous terms that it would not be a factor in attracting depositors to the bank.

§183. Stopping Payment as against Holder in Due Course.—

In many of the cases involving the right to stop payment of a check no distinction seems to be made between stopping payment as against a check owned by a holder in due course and one still held by the payee. In fact, in these cases the question whether the holder of the check is a holder in due course is not usually raised. However, in one instance it was expressly decided that a drawee bank was not liable to the indorsee of a check where it appeared that the check was paid to a holder in due course after the indorsee and drawer had both notified the bank to stop payment. In this case the check was indorsed in blank by the payee and delivered to the plaintiff by whom it was lost. The check was subsequently delivered to a merchant in payment for goods sold to a person, who was unknown to him, but whom he supposed to be the payee named in the check; the check was collected by the merchant. It was held that inasmuch as the merchant was a holder in due course, the drawee bank was not liable to the indorsee of the check by whom

12. *Elder v. Franklin Nat. Bank*, 25 Misc. Rep. (N. Y.) 716, 55 N. Y. Supp. 576.

13. *Elder v. Franklin Nat. Bank*, 25 Misc. Rep. (N. Y.) 716.

it has been lost, notwithstanding the fact that payment had been stopped.¹⁴

Had this action been brought by the drawer it would seem that the same reasons which prevented a recovery by the indorsee would apply and the bank would be protected. This rule, holding that a bank is not liable to its depositor or to the real owner of a check, for making payment thereon after payment has been stopped, where the payment is made to a holder in due course, works out with justice to all parties. If the bank were to carry out the order of the depositor and refuse to honor the check in the hands of a holder in due course, the drawer would be liable in an action by the holder. And since the drawer really loses nothing, if the bank pays the check under such circumstances, it ought not to be held liable for such payment.

§184. Stopping Payment where Check Operates as an Assignment.—Even in those jurisdictions in which a check is held to operate as an assignment, in favor of the holder, of a portion of the deposit equivalent to the amount for which the check is drawn, it is held that payment of a check may be stopped as against the payee of the check.¹⁵ But, where a check is regarded as an assignment, payment cannot be stopped as against a bona fide holder.¹⁶ Where, a check being regarded as an assignment, there are not sufficient funds on deposit at the time the check is delivered, and the drawer stops payment, and subsequently deposits funds sufficient to pay the check before it is presented, the order to stop payment becomes ineffective as to any bona fide holder of the check.¹⁷

In view of the general adoption of the Negotiable Instruments Law which provides that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, there are at the present time very few, if indeed any, states in which a check works an assignment.¹⁸

14. *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. Rep. 655.

15. *Taylor v. First Nat. Bank*, Minn., 138 N. W. Rep. 783; *Weiland's Admr. v. State Nat. Bank*, 112 Ky. 310, 65 S. W. Rep. 617; *Tramell v. Farmers' National Bank*, 11 Ky. Law Rep. 900.

16. *First Nat. Bank v. Keith*, 183 Ill. 475, 56 N. E. Rep. 179; *Union National Bank v. Oceana County Bank*, 80 Ill. 212; *Loan & Sav. Bank v. Farmers' & Merchants' Bank*, 74 S. C. 210, 54 S. E. Rep. 364; *Raesser v. National Exchange Bank*, 112 Wis. 591, 88 N. W. Rep. 618.

17. *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 49 N. E. Rep. 420.

18. As to when check operates as an assignment, see §4, 5 and 6.

CHAPTER XIV.

OVERDRAFTS.

§185. Overdrafts in General.

§186. Personal Liability of Bank Officers for Overdrafts Permitted by Them.

§187. Rights of Bank Against Depositor where Account Overdrawn.

§188. Effect of Crediting to One Depositor Check Drawn by Another.

§189. Right of Bank to Recover from Third Party to Whom it has Paid Overdraft.

§190. Bank's Right to Interest on Overdraft.

§185. Overdrafts in General.—An overdraft arises when a bank pays a check drawn by one of its depositors and there are no funds on deposit in the bank to the credit of the depositor, or the amount on deposit is insufficient to meet the check. Overdrafts are said to be in the nature of loans,¹ not made in a creditable way, and are regarded with scant favor by the courts.² It is entirely optional with the bank whether it will pay its depositor's overdraft check; it is under no obligation to pay any check drawn by a depositor unless there is on deposit to the credit of the drawer an amount sufficient for that purpose.³ And no such obligation arises by virtue of the fact that the bank has previously permitted overdrafts by the depositor whose check is presented.⁴

1. *Franklin Bank v. Byram*, 39 Me. 489.

In *Hennessy Bros. & Evans Co. v. Memphis Nat. Bank*, 129 Fed. Rep. 557, it was said: "An overdraft allowed is a loan due on demand and may be sued for as such."

2. *Pittsburgh v. First Nat. Bank*, 230 Pa. 176, 79 Atl. Rep. 406.

3. *Schoonmaker v. Gilmore*, 84 Ill. App. 17; *Troiike v. Cook County Sav. Bank*, 127 Ill. App. 413.

4. *First Nat. Bank v. First Nat. Bank*, Tenn. 154 S. W. Rep. 965. In *Schoonmaker v. Gilmore*, 84 Ill. App. 17, the court said: "But while this had been the course of dealing between the parties,

Where a bank refuses to pay a check because of lack of funds, no presumption arises that the check remains outstanding for payment, and the bank is under no duty to reserve from a future deposit made by the drawer a sum sufficient to pay the check.⁵

§186. Personal Liability of Bank Officers for Overdrafts. Permitted by Them.—Under certain circumstances a bank officer, who permits one of the bank's customers to overdraw his account, may be held personally liable to the bank for any loss sustained by the bank as a result of such overdraft. Thus, where the president of a bank instructed the cashier to honor the overdraft checks of a depositor, with whom the president was interested in business, it was held that the president was personally liable to the bank for the amount which it lost by the transaction.⁶ And, where the president of a bank opened an account for his insolvent son by discounting his unsecured note, and subsequently allowed him to overdraw his account without the knowledge of the board of directors, or of any advisory committee, it was held that the president was personally liable for the loss sustained.⁷

The attempt is occasionally made to charge a cashier with personal liability for losses occurring from the allowance of overdrafts. In these instances it has been consistently held by the courts that, where the cashier is charged with the duty of making loans and discounts, he will be liable to the bank for the unpaid overdraft of a customer only where he has failed to make reasonable inquiry into the financial standing of the customer, or has failed to exercise the care and discretion which an ordinarily prudent man would exercise in his own affairs.

In other words the propriety of allowing overdrafts is one that addresses itself to the business discretion and judgment of the officers having that matter in charge. If they act prudently and honestly they will not be held personally responsible for losses that occur. On the other hand, if they allow the funds

there is no evidence that there was any agreement that such course should be continued or followed without change."

5. *Gilliam v. Merchants' Nat. Bank*, 70 Ill. App. 592.

As to duty of bank where check, for an amount larger than the amount on deposit is presented, see, *supra*, §170.

6. *Oakland Bank v. Wilcox*, 60 Cal. 126.

7. *Western Bank of Louisville v. Coldewey's Executrix*, 26 Ky. L. Rep. 1247, 83 S. W. Rep. 629.

of the bank to be appropriated by persons known to be insolvent or whose financial standing would not justify the extension of such credit, and loss occurs, they will be held liable to the bank as for a neglect of duty.⁸

§187. Rights of Bank Against Depositor where Account Overdrawn.—The drawing of a check by a depositor in a sum greater than the amount he has on deposit, in itself, implies a promise on the part of the depositor to repay to the bank the amount by which the account is overdrawn, and the bank may maintain an action against the depositor to recover such amount.⁹ And the bank may not only recover from the depositor, but it may follow and reclaim the fund in the hands of any person, who has not received it in good faith and given value therefor.¹⁰

Where a firm account was overdrawn at the instance of one of the partners, in the payment of his own personal obligations, it was held that the bank might recover from the other partner, notwithstanding that he had instructed the bookkeeper to draw checks for firm purposes only.¹¹ A bank may recover the amount of a depositor's overdraft, even though the payment was made by the bank in the belief that the deposit was sufficient for that purpose, and the true status of the account might have been ascertained without difficulty by examining

8. *Wynn v. Tallapoosa County Bank*, 53 So. Rep. 228; *Pryse v. Farmers' Bank*, 17 Ky. L. Rep. 1056, 33 S. W. Rep. 532; *Cope v. Westbay*, 188 Mo. 638, 87 S. W. Rep. 504.

In *First Nat. Bank v. Reese*, 25 Ky. L. Rep. 778, 76 S. W. Rep. 384, it was held that "where the cashier without the aid of a finance committee or the direction of a board of directors, acts upon the custom and usage of the particular bank by the advice of the president and directors individually, and upon his own judgment as to the best interests of the bank," and allows a depositor in good credit with the bank to overdraw his account, he will not be liable for a loss resulting therefrom.

9. *People's Nat. Bank v. Rhoades*, Del., 90 Atl. Rep. 409; *Thomas v. International Bank*, 46 Ill. App. 461; *McLean County Bank v. Mitchell*, 88 Ill. 52; *Bremer County Bank v. Mores*, 73 Ia. 289, 34 N. W. Rep. 863; *Franklin Bank, v. Byram*, 39 Me. 489; *Frankenberg, v. First Nat. Bank*, 33 Mich. 46.

A deposit made subsequent to an overdraft is presumed in the absence of evidence to the contrary, to be intended to apply toward the payment of the overdraft. *Nichols v. State*, 46 Neb. 715.

10. *Tradesman's Bank v. Merritt*, 1 Paige (N. Y.) 302.

11. *Morris v. First Nat. Bank*, 162 Ala. 301, 50 So. Rep. 137.

the books of the bank at the time of the presentment of the check.¹² A bank may also recover the amount paid out on checks, drawn by a person who had no account in the bank, the checks having been paid by the direction of the president of the bank, acting without authority.¹³

But, while a bank may recover from a depositor the amount of his overdraft, the fact that a bank pays a check which overdraws the drawer's account does not give the bank any rights against the property, in payment for which the check was given. Paying the check is not paying for the property; it is merely paying the depositor's money on his order.¹⁴

Where an account is overdrawn by the depositor's agent, the right of the bank to recover from the depositor depends upon the circumstances. Mere authority to an agent to draw checks against his principal's account does not authorize him to overdraw and, consequently, if he does overdraw, the principal is not liable to the bank unless he ratifies the agent's act, or is estopped to deny the agent's authority by reason of special circumstances.¹⁵ And where an agent, acting without authority, opened an account in his principal's name and overdrew the account, it was held that the principal was not liable to the bank for the amount of the overdraft, although the money was paid by the agent to the principal in settlement of his accounts.¹⁶ But, if the principal continually allows his agent to overdraw his account, the bank is entitled to assume that such acts are authorized and it may hold the principal liable.¹⁷

§188. Effect of Crediting to One Depositor Check Drawn by Another.—In many instances it seems to be the practice of banks,

12. *James River Nat. Bank v. Weber*, N. D., 124 N. W. Rep. 952.

13. *Dowd v. Stephenson*, 105 N. C. 467, 10 S. E. Rep. 1101.

14. *Kollock v. Emert*, 43 Mo. App. 566.

15. *Merchants' Nat. Bank v. Nichols & Shepard Co.*, 223 Ill. 41, 79 N. E. Rep. 38.

16. *Case v. Hammond Packing Co.*, 105 Mo. App. 168, 79 S. W. Rep. 732. In the opinion it was said: "If money due a principal from his agent is obtained by such agent by the unauthorized use of his principal's name, and paid over to the principal, who receives it in good faith, without notice, he is not liable to the party from whom the agent got the money. The fact that he keeps the money after being informed of how the agent obtained it is not a ratification."

17. *Merchants' & Planters' Nat. Bank v. Clifton Mfg. Co.*, 56 S. C. 320, 33 S. E. Rep. 75.

when one depositor offers for deposit a check drawn on the same bank by another depositor, to credit the amount of the check in the depositing customer's pass book, and ascertain afterwards whether or not the check is drawn against sufficient funds. In cases of this kind it is held by the weight of authority that, where the deposit is made in good faith, and credit is duly given, the bank cannot afterwards revoke the credit, upon discovering the check to be an overdraft.¹⁸ These decisions take the view that there is no difference, in such a case, between requesting payment of the check in money and requesting payment by a transfer to the credit of the holder. In either event the bank has the option to receive or reject the check upon presentment, or to receive it upon such conditions as may be agreed upon. If it pays the check in cash to a bona fide holder, the transaction is closed so far as the holder is concerned; the bank cannot recover the money back from him. And the same is true if it credits his account with the amount of the check; there is a final payment which cannot be revoked.¹⁹ The holder,

18. *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *Montgomery County v. Cochran*, 126 Fed. Rep. 456; *City Nat. Bank v. Burns*, 68 Ala. 267; *American Exch. Nat. Bank v. Gregg*, 138 Ill. 596, 28 N. E. Rep. 839; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; *Consolidated Nat. Bank v. First Nat. Bank*, 129 N. Y. App. Div. 538, 114 N. Y. Supp. 308; *Oddie v. National City Bank*, 45 N. Y. 735; *Bryan v. First Nat. Bank*, 205 Pa. 7, 54 Atl. Rep. 480.

Where a check was deposited by an indorsee in a branch office of the drawee bank, marked paid and credited in his pass book, and was subsequently, because of insufficient funds, returned to the depositor, who took it up and gave his own check to the bank for the amount, it was held that the payee of the check had no cause of action against the bank. *Balsam v. Mutual Alliance Trust Co.*, 132 N. Y. Supp. 325.

19. In *Oddie v. National City Bank*, 45 N. Y. 735, the court said: "The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs, and then deposited. When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463, but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. In the case of a deposit the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank has always the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account, or otherwise."

however, must act in good faith in order to be entitled to retain the benefit which the law accords him upon depositing a check to his credit in the drawee bank. Thus, it has been held that, where the holder of a check deposited it in the drawee bank, knowing that the drawer had no funds there to meet it, the crediting of the check to the holder did not constitute a payment of the check and the depositor could not recover the amount from the bank.²⁰

The rule stated has not been followed in California. In that jurisdiction it is held that, when a check on the same bank is presented by a depositor for credit, and noted in his pass book, there is no presumption that the check was received as cash or otherwise than for collection.²¹ The bank has until the close of banking hours on the day of deposit in which to ascertain whether the check is drawn against sufficient funds.²²

Of course, a bank, receiving for deposit a check drawn upon itself, may always expressly agree that payment shall be deferred for a reasonable time, until the bank can ascertain whether the check is good; or if there is a custom to that effect, among banks, the custom is binding upon the depositor, provided he has knowledge of it.²³

§189. Right of Bank to Recover from Third Party to Whom it has Paid Overdraft.—It is a general rule, supported by most of the authorities, that where a drawee bank pays a check in the ordinary course of business to one who has received and presents it in good faith, under the mistaken belief that the drawer has on deposit sufficient funds to pay the check, the bank will not be permitted to recover back the money so paid. It is the duty of the bank to know the state of its depositor's account. Before paying the check, the bank is presumed to have taken into consideration whether the check is drawn against sufficient funds. It may reject the check for want of funds, but if it pays the check, it finally exercises its option to pay or not to pay, and the transaction is closed as between the parties to the payment.

Frequently a bank pays an overdraft check with knowledge

20. *Peterson v. Union Nat. Bank*, 52 Pa. 206.

21. *National Gold Bank v. MacDonald*, 51 Cal. 64.

22. *Ocean Park Bank v. Rogers*, 6 Cal. App. 678, 92 Pac. Rep. 879.

23. *Polack v. National Bank of Commerce, Mo.*, 151 S. W. Rep. 774.

of the fact, merely as an accommodation to its depositor. Such a payment is in the nature of a loan to the drawer and the bank looks to him and to no one else, to make good the amount. But it often happens that a bank pays an overdraft check in the mistaken belief that it is drawn against sufficient funds. A bank may pay such a check in the rush of business, or as the result of an error of bookkeeping; but, whatever may be the cause of the payment, most of the courts are agreed that the bank cannot recover the money back from the person to whom the payment was made. This is an exception to the general rule of law that money paid under a mistake of fact may be recovered.²⁴

But, while the general rule is as stated above, the courts are not agreed upon the principle which underlies the rule. Some of them refuse to permit a recovery by the bank on the ground

24. *First Nat. Bank v. Devenish*, 15 Colo. 229; *First Nat. Bank v. Sidebottom*, 147 Ky. 690, 145 S. W. Rep. 404; *National Exch. Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. Rep. 1026; *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515, 17 Atl. Rep. 336; *Boylston Nat. Bank v. Richardson*, 101 Mass. 287; *Penacook Sav. Bank v. Hubbard*, 58 N. H. 167; *National Bank of New Jersey v. Berrall*, 70 N. J. L. 757, 58 Atl. Rep. 189; *Hull v. State Bank, Dudley (S. C.)* 259; *Spokane & Eastern Trust Co. v. Huff*, Wash., 115 Pac. Rep. 80.

In the case of *Manufacturers' Nat. Bank v. Swift*, 70 Md. 515, 17 Atl. Rep. 336, the court said: "It is the duty of a bank to know the state of its depositor's account, and if it makes a mistake in this respect it must abide the consequences. The presentation of a check is a demand for payment; if it is paid all the rights of the payee have been satisfied and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles, if, when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he has no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality. And the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder."

Where a bank paid checks drawn by a depositor against items deposited but not collected, and the bank was unable to make collection, thus leaving the depositor's account over-drawn, it was held, that the bank could not recover the amount from the payee to whom they were paid. *First Nat. Bank v. Sidebottom*, 147 Ky. 690, 145 S. W. Rep. 404.

Where a check was paid in ignorance of the fact that the drawer was insolvent, the drawer being indebted to the bank at the time, it was held that the bank was not entitled to recover the money back from the party to whom it had been paid, although the bank would have refused payment had it known of the drawer's insolvency at the time the check was presented. *National Exchange Bank v. Ginn*, 114 Md. 181, 78 Atl. Rep. 1026.

of want of privity between the holder of the check and the bank; others upon the ground that a payment of this kind is not a payment under a mistake of fact within the rule that permits a recovery in such cases, but is payment attributable to negligence and want of attention on the part of the bank; and others upon the ground that to permit a bank to repudiate such a payment would destroy the certainty that must pertain to commercial transactions of this sort if they are to remain useful to the business public.²⁵

Where a bank paid such a check to a messenger who, in good faith, turned the money over to the payee, it was held that the bank had no right of recovery against the messenger.²⁶ In one instance the error of overpayment was discovered while the holder was still at the bank's counter, but it was held that title to the money had passed irrevocably to the payee.²⁷ The right of the bank to recover is denied even in a case where the check was paid after banking hours, as an accommodation to the payee, in ignorance of the fact that the drawers had withdrawn their funds on that day.²⁸

In a case, where a check was paid at a branch office of the drawee, it was held that the money might be recovered from the person to whom it was paid, when it was later discovered that the account was overdrawn.²⁹

In New York and Massachusetts there are decisions which permit a bank to recover a payment on an overdraft check, from the party to whom the payment was made, provided such party has not altered his position to his detriment prior to being notified of the error. In other words, if allowing the drawee bank to recover places the party receiving payment in no worse position than he would have occupied, had payment been refused upon the presentment of the check, a recovery is permitted. In these cases, however, the payment was made, not over the counter of the bank, but at the clearing house.³⁰

25. *Spokane & Eastern Trust Co. v. Huff*, Wash., 115 Pac. Rep. 80.

26. *Penacook Sav. Bank v. Hubbard*, 58 N. H. 167.

27. *Chambers v. Miller*, 13 C. B. N. S. (Eng.) 125.

28. *Spokane & Eastern Trust Co. v. Huff*, Wash., 115 Pac. Rep. 80.

29. *Woodland v. Fear*, 7 El. & B. (Eng.) 519.

30. *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass 281; *Citizens' Central Nat. Bank v. New Amsterdam Nat. Bank*, 128 N. Y. App. Div. 554, 109 N. Y. Supp. 872. See *infra*, §228.

In *Keene v. Collier*, 58 Ky. (1 Metc.) 415, it was held that an action

§190. Bank's Right to Interest on Overdraft.—In the absence of any agreement a bank, which has allowed a depositor to overdraw his account, is not entitled to interest on the money thus advanced, until the money has been demanded and payment refused.³¹ But, after a demand has been made, interest begins to run in favor of the bank.³² Where the depositor has agreed to pay interest on his overdrafts, but no rate of interest has been agreed upon, the bank may collect interest at the legal rate.³³ And, where an overdraft was settled by the execution and delivery of a note, payable on demand, it was held that the amount bore interest from the date of the settlement.³⁴ In a case where a national bank charged more than six percent. interest on overdrafts, it was held that it thereby forfeited the right to any interest at all.³⁵

by a bank to recover an overdraft payment should be commenced in the name of the bank, and not in the name of the depositor, but it was not directly held that the bank was entitled to recover.

31. *Owens v. Stapp*, 32 Ill. App. 653; *Hubbard v. Charlestown Branch R. R. Co.*, 52 Mass. 124.

32. *Casey v. Carver*, 42 Ill. 225; *Union Bank v. Sollee*, 2 Strob. (S. C.) 390.

33. *Loan & Exch. Bank v. Miller*, 39 S. C. 175, 17 S. E. Rep. 592.

34. *Hennessy Bros. & Evans Co. v. Memphis Nat. Bank*, 129 Fed. Rep. 557.

35. *Third Nat. Bank v. Miller*, 90 Pa. 241.

CHAPTER XV.

COLLECTION OF CHECKS.

- §191. General Duties of Collecting Bank.
- §192. Duty of Bank to Make Inquiry as to Checks Not Heard From.
- §193. Duty of Collecting Bank to Protest, etc.
- §194. Contract Exempting Bank from Liability for Negligence.
- §195. Sending Check Directly to Drawee Bank.
- §196. The Rule in New York.
- §197. Where Drawee is Only Bank at that Place.
- §198. Effect of Custom to Send Checks Directly to Drawee Bank.
- §199. Effect of Rule in Pass Book.
- §200. Circuitous Routing of Checks.
- §201. Right to Charge Back Uncollected Checks.
- §202. Right of Bank to Charge Back Amount of Lost Check.
- §203. Liability of Bank for Defaults of Correspondent.
- §204. Bank Held Not Liable for Correspondent's Defaults.
- §205. Bank Liable for Correspondent's Defaults.
- §206. Liability of Bank for Default of Correspondent Under Statute.
- §207. Contract Exempting Bank from Liability for Correspondent's Defaults.
- §208. Liability of Bank for Acts of Notary.
- §209. What may be Received in Payment.
- §210. Custom to Receive Draft in Payment of Check.
- §211. Collection of Checks Payable to Agent, Administrator, Trustee, Guardian, etc.
- §212. Title to Checks Deposited in Bank.
- §213. Check Indorsed in Blank and Credited as Cash.
- §214. Checks Indorsed "For Collection."
- §215. Checks Indorsed "For Deposit."
- §216. Effect of Bank's Right to Charge Back Uncollected Checks.

- §217. Insolvency of Bank in which Check is Deposited.
- §218. Whether the Depositor is a Preferred or General Creditor.
- §219. Rights of Correspondent Bank on Failure of Initial Bank.
- §220. Insolvency of Correspondent Bank.
- §221. Deposit when Officers Aware of Bank's Insolvency.
- §222. Liability of Bank Collecting Forged or Altered Checks.

§191. General Duties of Collecting Bank.—A bank, receiving a check for collection, whether directly from a depositor or from some other bank, must use ordinary care and diligence in taking the steps necessary to accomplish the collection. It is bound to do all reasonable acts to procure payment and must faithfully observe such instructions as are given to it with reference to the manner in which the collection is to be made. The neglect or default of the collecting bank in this regard will in general render it liable for any loss resulting therefrom to the owner of the check.¹

Once having collected a check, the collecting bank should not return the proceeds to the paying bank, merely because the paying bank claims to be entitled to have the money repaid. The duty of the collecting bank is to its principal, for whom it made the collection, and not to the paying bank, and an error in refunding the amount collected, will render it liable to the principal. This is illustrated in a decision by the Supreme Court of Pennsylvania. The plaintiff bank transmitted a cashier's check to the defendant bank for collection. After collecting the check from the drawee, the defendant returned the money upon being informed by the drawee that the payment had been made through mistake, in that the check had been fraudulently issued by the cashier. It was held that the defendant was liable for the amount to the plaintiff even though the plaintiff had notice at the time of receiving the check of its fraudulent character.²

1. *Lord v. Hingham Nat. Bank*, 186 Mass. 161, 71 N. E. Rep. 312; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33, 82 N. W. Rep. 102; *St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank*, 35 Okla. 434, 130 Pac. Rep. 280; *Bank of Commerce v. Ingram*, Okla., 124 Pac. Rep. 64; *Monongahela Nat. Bank, v. First Nat. Bank*, 226 Pa. 270, 75 Atl. Rep. 359; *Morris v. Union Nat. Bank*, 13 S. D. 329, 83 N. W. Rep. 252; *Merchants' Nat. Bank v. Dorchester, Tex.*, 136 S. W. Rep. 551.

2. *Monongahela Nat. Bank v. First Nat. Bank*, 236 Pa. 270, 75 Atl. Rep. 359.

Of course, there are cases in which a collecting bank may refund the money it has collected on a check without subjecting itself to liability. Banks frequently do make such a return of the proceeds where it is brought to their attention that the check bore a forged indorsement or was fraudulently raised, and in doing this, they are usually acting within their rights. But in doing so the bank acts upon its own responsibility and subjects itself to the rule that it is never a defence to an action by a principal for money collected by an agent for the latter to show that it was paid over to a third party, to whom it belonged in equity and good conscience. The safe course for a collecting bank to pursue, in such circumstances, is for it to notify its principal and the other claimant to the fund that it will retain possession of the money as stakeholder until some satisfactory adjustment is made, or the rights of the parties judicially determined.

§192. Duty of Bank to Make Inquiry as to Checks Not Heard From.—The obligation of a bank receiving checks for collection does not terminate upon its sending the checks forward in the usual course of business. If the checks are not heard from within a reasonable time, the bank is under a duty to take steps to ascertain why the amount has not been remitted and to report the matter to its depositor.³ Thus, where a bank receives and forwards a check for collection and, though it does not hear from its correspondent for more than a month, takes no steps toward tracing the check, it is liable to the depositor for the amount of the check, if the bank on which the check is drawn fails in the meantime.⁴ Where, however, checks are sent to a correspondent bank, not for collection and return, but for collection and credit, and the checks are credited to the account of the forwarding bank immediately upon receipt by the correspondent bank, the forwarding bank is not guilty of negligence in failing to make inquiry as to the result of the collection.⁵

3. *Second Nat. Bank v. Merchants' Nat. Bank*, 111 Ky. 930, 65 S. W. Rep. 4; *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485; *Hobart Nat. Bank v. McMurrrough*, 24 Okla. 210, 103 Pac. Rep. 601; *Harter v. Bank of Brunson*, 92 S. C. 440, 75 S. E. Rep. 696; *First Nat. Bank v. City Nat. Bank, Tex.*, 166 S. W. Rep. 689.

4. *Hobart Nat. Bank v. McMurrrough*, 24 Okla. 210, 103 Pac. Rep. 601.

5. *First Nat. Bank v. City Nat. Bank, Tex.*, 166 S. W. Rep. 689.

§193. Duty of Collecting Bank to Protest, etc.—A bank receiving a check for collection is under a duty, in the absence of instructions to the contrary, to make due presentment for payment, and in case of non-payment to send out proper notices of dishonor. It is also the obligation of the collecting bank to protest for non-payment in cases where this formality is required to preserve the rights of the owner against the parties to the check or where it has been instructed to protest.⁶

In a Minnesota case the defendant bank, having cashed a check for the payee, forwarded it to the plaintiff bank at Chicago, its correspondent, for collection and remittance. The plaintiff credited the check to the defendant's account and the defendant subsequently drew out the amount. The plaintiff forwarded the check to the Bank of Minneapolis, in St. Paul, where the drawee was located. At about the time the check was received in St. Paul, the Bank of Minneapolis and the drawee bank both failed. While it appeared that there was an attempt to present the check for payment, the evidence was insufficient to show that it was duly protested. It was held that the plaintiff bank was responsible for the neglect in this regard and could not recover from the defendant.⁷

§194. Contract Exempting Bank from Liability for Negligence.—It is unlikely that any bank would undertake to contract with its depositors against liability for its own negligence; and, if such an agreement should be made, it is, to say the least, extremely doubtful whether it would be enforced by the courts. But it is not unusual for banks to have printed upon their deposit slips, statements to the effect that they will not be responsible for collection items until the money is actually received. These stipulations, however, do not relieve the bank from responsibility for its own negligent acts. In a South Carolina case, it appeared that the plaintiff indorsed and de-

6. *Chapman v. McCrea*, 63 Ind. 360; *Fort Dearborn Nat. Bank v. Security Bank*, 87 Minn. 81, 91 N. W. Rep. 257; *Ripley Nat. Bank v. Latiner*, 64 Mo. App. 321; *McBride v. Illinois Nat. Bank*, 138 N. Y. App. Div. 339, 121 N. Y. Supp. 1041; *Merchants' State Bank v. State Bank*, 94 Wis. 444.

As to when protest is essential see, *supra*, §113.

7. *Fort Dearborn Nat. Bank v. Security Bank*, 87 Minn. 81, 91 N. W. Rep. 257. This case also applied the rule that a collecting bank is liable for the defaults of its correspondents. See, *infra*, §205.

posited in the defendant bank a draft, which he listed on a deposit slip containing the following stipulation: "For value received, we the undersigned hereby agree in depositing the items listed below for collection or credit with the Bank of Brunson, Brunson, S. C., that we will not hold the bank liable to us for said items until the cash for each has been paid to the Bank of Brunson, Brunson, S. C." The defendant forwarded the draft for collection and in due course should have received a report in about three days. Nothing was heard, however, for about six months, when the defendant received word from its correspondent that the draft had been dishonored. It appeared that the plaintiff was injured by the delay because the drawer was solvent when the draft was drawn, but was insolvent at the time notice was given. It was held that the defendant was guilty of negligence in failing to find out sooner whether the draft had been received and collected by its correspondent and in failing to give the plaintiff earlier notice of the dishonor. The defendant was held liable to the plaintiff for the amount of the draft, notwithstanding the stipulation on the deposit slip.⁸

§195. Sending Check Directly to Drawee Bank.—In the collection of checks deposited with it a bank frequently finds it convenient, if not necessary, to send them directly to the banks on which they are drawn. The collecting bank may have no correspondent at the place where the drawee bank is located; in fact, the drawee may be the only bank at that place. These and other circumstances, in the eyes of a banker, are

8. *Harter v. Bank of Brunson*, 92 S. C. 440, 75 S. E. Rep. 696. "Whatever else may be the legal effect of the stipulation printed on the deposit slip, it does not purport to exempt the bank from liability for its negligence, or that of its agents; and it should not have that effect; nor can it be construed as a waiver of the rights of a depositor of commercial paper, under the law merchant, with regard to presentment, demand, and notice of dishonor. It does, however, afford evidence of an agreement that the paper so deposited was not absolutely sold to the bank, and that the credit given a customer on the deposit of such an item is not absolute, but contingent upon its collection; and therefore, if it proves to be uncollectible, notwithstanding, the exercise of due and ordinary care and diligence on the part of the bank, such credit is subject to a counter charge, and the bank shall not be held liable for the failure to collect."

often deemed sufficient reason for sending a check, deposited for collection directly to the drawee bank. But the courts, almost without exception, held that this method of collection amounts to negligence and renders the collecting bank liable to its depositor in the event that the collection is not made through a default on the part of the drawee.⁹ Thus a collecting bank is liable where it mails a check received for collection directly to the drawee and receives the drawee bank's check in payment which is protested because of the failure of the latter bank.¹⁰ But where the depositor of checks which have been sent directly to the drawee, receives without objection the drawee's dis-

9. *Lowenstein v. Bresler*, 109 Ala. 326, 19 So. Rep. 860; *Jefferson County Savings Bank v. Hendrix*, 147 Ala. 670, 39 So. Rep. 295; *Farley National Bank v. Pollock*, 145 Ala. 321, 39 So. Rep. 612; *German National Bank v. Burns*, 12 Colo. 539, 21 Pac. Rep. 714; *Drovers' National Bank v. Anglo-American etc. Co.*, 117 Ill. 100, 7 N. E. Rep. 601; *Anderson v. Rodgers*, 53 Kans. 542, 36 Pac. Rep. 1067, 27 L.R.A. 248; *First National Bank v. Citizens' Savings Bank*, 123 Mich. 336, 82 N. W. Rep. 66, 48 L.R.A. 583; *Carson P.S. Co. v. Fincher*, 129 Mich. 687, 89 N. W. Rep. 570; *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. Rep. 980, 44 L.R.A. 504; *American Exchange Nat. Bank v. Metropolitan Nat. Bank*, 71 Mo. App. 451; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 69 N. W. Rep. 765; *Bank of Rocky Mount v. Floyd*, 142 N. C. 187, 55 S. E. Rep. 95; *National Bank of Com. v. Johnson*, 6 N. D. 180, 69 N. W. Rep. 49; *Pickett v. Baird Inv. Co.*, N. D., 133 N. W. Rep. 1026; *Wagner v. Crook*, 167 Pa. 259, 31 Atl. Rep. 576; *Hazlett v. Commercial Nat. Bank*, 132 Pa. 118, 19 Atl. Rep. 55; *Harvey v. Girard Nat. Bank*, 119 Pa. 212, 13 Atl. Rep. 202; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 2 Atl. Rep. 687; *Givan v. Bank of Alexandria, Tenn.*, 52 S. W. Rep. 923, 47 L.R.A. 270; *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. Rep. 248, 18 L.R.A. (N.S.) 441; *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318, 34 S. W. Rep. 458; *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. Rep. 967; *Farwell v. Curtis*, 7 Biss. 160, Fed. Cas. No. 4,690.

It is negligent for a collecting bank to send a certificate of deposit directly to the issuing bank. In such case the collecting bank is liable where the certificate is not paid because of the failure of the bank. *First Nat. Bank of Chicago v. Bank of Whittier*, 221 Ill. 319, 77 N. E. Rep. 563. See also *German Nat. Bank v. Burns*, 12 Colo. 539; *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. Rep. 967.

In England the practice of sending checks directly to the banks on which they are drawn for collection is upheld. *Hare v. Henty*, 10 C. B. N. S. 65; *Bailey v. Bodenham*, 16 C. B. N. S. 288; *Prideaux v. Criddle*, 10 B. & S. 515; *Heywood v. Pickering*, L. R. 9 Q. B. 428.

10. *Farley National Bank v. Pollock and Bernheimer*, 145 Ala. 321, 39 So. Rep. 612.

honored remittance draft, he ratifies the act of the collecting bank in sending the checks directly to the drawee and cannot thereafter hold the collecting bank liable.¹¹ And it has been held that where a collecting bank sent a check directly to the drawee and it was not collected because of the failure of the drawee, the collecting bank was not liable, it appearing that even if the check had been sent to an independent collector it would not have reached its destination in time to be presented before the drawee's failure.¹²

The rule, which makes it negligent for a collecting bank to send a check directly to the bank on which it is drawn, is generally placed on the ground that, in so doing, the collecting bank makes the debtor the agent of the creditor in the very matter of collecting the debt, and that such an agency is improper.¹³

In some of the cases the bank, in which a check is deposited for collection, escapes liability to the depositor for a loss resulting from sending the check directly to the drawee bank by reason of another bank intervening between it and the drawee. That is, the initial bank sends the check to a suitable correspondent, which in turn sends it directly to the drawee. The correspondent bank is then in some jurisdictions held to be the agent of the depositor and not of the forwarding bank, and the latter is held not responsible to the depositor for the default of the

11. *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. Rep. 248.

12. *First National Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318. See also *Givan v. Bank of Alexandria, Tenn.*, 52 S. W. Rep. 923, 44 L. R. A. 270.

Where the parties agree that a check may be remitted directly to the drawee bank, the collecting bank is not liable for any loss which may result from forwarding the check in that manner. *First Nat. Bank v. First Nat. Bank, Tenn.*, 154 S. W. Rep. 965.

13. *German Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. Rep. 714. The reason of the rule is herein expressed as follows: "Even if we can conceive of such an anomaly as one bank acting as the agent of another to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by businesslike prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of the principal. If the debtor is embarrassed, there is the temptation to delay; if wanting in integrity, there is the opportunity to destroy the evidence of the indebtedness."

correspondent.¹⁴ Many of the states hold, contrary to the rule expressed, that the initial bank is liable to its depositor for losses occurring through the negligence or default of a correspondent bank, to which a check is sent for collection.¹⁵

§196. The Rule in New York.—The state of New York stands alone in this country in its opposition to the general rule, under which a bank is deemed guilty of negligence in sending a check directly to the bank on which it is drawn.¹⁶ But, even in New York, there is no decision of the court of last resort deciding the question squarely. The only case directly on the point in New York is a Supreme Court decision, in which the action was brought by the payee against the drawee of a check. The bank, in which the payee had deposited the check, sent it directly to the drawee bank and that bank suspended, after receiving the check, without remitting. In holding that the drawer was liable to the payee, the court said: "The fact that a check mailed by the holder to the drawee for payment is not paid, when it would have been paid if presented at the payee's (drawee's) counter, is not, it seems, in this state, a defense in favor of the drawer, though by the transaction the drawer lost his deposit, though it has been held otherwise."¹⁷

§197. Where Drawee is Only Bank at that Place.—Even in a case where a check is drawn on the only bank in a certain city, town or village, the weight of authority is to the effect that it is negligent for a bank, receiving such check for collection, to send it directly to the drawee bank. And if, in such a case, the collection fails as a result of a default on the part of the drawee, the collecting bank is held liable to the owner of the check.¹⁸ The courts do no intimate how a collection is to

14. *Givan v. Bank of Alexandria, Tenn.*, 52 S. W. Rep. 923, 47 L. R. A. 270.

15. On this question, see, *infra*, §203-207.

16. *McIntosh v. Tyler*, 47 Hun (N.Y.) 99; citing *Indig v. National City Bank*, 80 N. Y. 100 and *Briggs v. Central Nat. Bank*, 89 N. Y. 182. See also *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485.

17. *McIntosh v. Tyler*, 47 Hun (N.Y.) 99.

18. *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. Rep. 980, 44 L.R.A. 504; *Pinkney v. Kanawha Valley Bank*, 68 W. Va. 254, 69 S. E. Rep. 1012, 32 L.R.A., N. S., 987; *Winchester Milling Co. v. Bank of Winchester, Tenn.*, 111 S. W. Rep. 248.

be accomplished, where there is no other bank at the place where the drawee is located, without sending the check directly to the drawee bank. Some of them suggest that the collection in such case might be worked through the medium of an express company. Apparently the only other possible method is to send a messenger out with the check with instructions to present it personally and collect it over the counter of the drawee bank.

Some of the writers on this branch of the law have expressed the opinion that there is an exception to the general rule in the case where the drawee is the only banking institution at that point, and that in such a case the check may be forwarded directly to the drawee bank, but very little support for this view is to be found in the authorities. It has been held, however, by the Supreme Court of Texas, in a recently decided case, that it is not negligent for a collecting bank to send a draft directly to the drawee bank where it appears that there is no other bank located at the same place, that the drawee is a bank in good standing, that express companies refuse to handle protest items and that there is an established custom among banks in the locality to forward checks under such circumstances directly to the drawee banks with instructions to protest. It also appeared in this case that the owner of the check was aware of the custom and did not expect the collection to be differently handled.¹⁹ And it has been held that, where the depositor knew that there was no other bank at the place where the drawee was located, and was aware of the fact that the check was to be collected without expense to him in accordance with banking usages, and the bank in which he deposited the check sent it to a correspondent, which in turn forwarded it directly to the drawee, the deposit bank was not liable to the depositor, the check not being collected because of the failure of the drawee before the arrival of the draft which it remitted in pay-

19. *First National Bank v. City National Bank, Texas*, 166 S. W. Rep. 689.

It has been held in a recent Ohio decision that it is not negligence for a bank receiving a certificate of deposit for collection to send it directly to the issuing bank where there is no other bank at that place, and such action is justified by custom. One who makes a bank his collecting agent impliedly agrees that the agency may be performed in accordance with banking customs, though he has no actual knowledge of their existence. *Hilsinger v. Trickett, Ohio*, 99 N. E. Rep. 305.

ment.²⁰ Of course, in a case where there is no other bank at the place where the drawee is located, and the depositor assents to the sending of the check directly to the drawee, he cannot thereafter hold the bank liable for a loss resulting from this method of collection.²¹

A bank, receiving a check for collection, should undoubtedly not send it directly to the drawee, where there is another bank at that place through which the collection may be handled. But, in a case where there is no other bank at the place where the drawee is located, and no other practicable method of accomplishing the collection presents itself, it would seem, in spite of the weight of judicial opinion to the contrary, that the collecting bank is justified in sending the check directly to the drawee with instructions to protest in case of dishonor, at least if the drawee is in good standing and the collecting bank has no reason to apprehend a loss as a result of collecting the check in this manner. In the collection of checks the banks render an important and valuable service to the general public and a policy seems unwise and unjust which makes them liable almost to the extent of an insurer in the handling of such transactions. But the authorities cited in the footnotes to this section clearly indicate that the sending of collection items directly to the drawee banks is a dangerous practice and one to be avoided.

§198. Effect of Custom to Send Checks Directly to Drawee Bank.—Custom will sometimes sanction a practice which would otherwise be declared invalid. But the fact that it is customary to send checks directly to the banks on which they are drawn does not render such practice proper according to the authorities. The practice constitutes negligence and the courts hold that custom will never justify negligence and that this custom is invalid for the further reason that it is unreasonable.²² Such a custom, however, has been held to be valid, in

20. *Wilson v. Carlinville Nat. Bank*, 187 Ill. 222, 58 N. E. Rep. 250, 52 L.R.A. 632.

21. *First Nat. Bank v. Citizens' Sav. Bank*, 123 Mich. 336, 82 N. W. Rep. 66, 48 L.R.A. 583.

22. *Farley Nat. Bank v. Pollock*, 145 Ala. 321, 39 So. Rep. 612, 2 L. R.A., §N. S., 194; *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. Rep. 980, 44 L.R.A. 504; *Bank of Rocky Mount v. Floyd*, 142 N. C. 187, 55 S. E. Rep. 95.

In two recent decisions, one in Texas and the other in Ohio, it has

so far, at least, as it applies to an unindorsed check, made payable to the order of the collecting bank.²³

§199. Effect of Rule in Pass Book.—In view of the fact that the courts look upon the sending of a check by a collecting bank directly to the drawee bank as a negligent and unreasonable act, it is doubtful whether any rule, which the bank might enact and bring to its depositors' attention by publication in its pass books, or otherwise, would operate to protect the bank from liability for losses sustained through this method of collection. In one instance the bank, by a printed notice in its pass books, limited its liability so that, when receiving drafts or checks for collection, or on deposit, it acted as an agent only, and in forwarding these to other points for collection, it was bound only to select suitable subagents, and assumed no responsibility for their defaults. It was held that, notwithstanding this provision, the bank was bound to exercise reasonable care, and was liable to the depositor where it sent a check directly to the drawee and the amount was thereby lost. "Now, can it be held," said the court, "that defendant exercised reasonable care when it sent the check by mail to the very party most interested against the payee and principal, and thus to place such principal entirely in the hands of its adversary."²⁴

§200. Circuitous Routing of Checks.—Checks on out-of-town banks, which are deposited with a bank for collection, must of necessity be collected through the agency of intermediary or correspondent banks; in fact it is generally held that it is an act of negligence for a collecting bank to send a check by mail directly to the bank on which it is drawn.²⁵ It should follow that a collecting bank is not guilty of negligence and does not render itself liable to its depositor where it forwards his check through one or more correspondent banks for collection, provided the check is sent in a reasonably direct

been held that a custom to send items directly to the paying bank where there is no other bank at that place is valid. See, *supra*, §197.

23. *Kershaw v. Ladd*, 34 Oregon 375, 56 Pac. Rep. 402, 44 L. R. A. 236.

24. *Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. Rep. 980, 44 L. R. A. 504.

25. See, *supra*, §195-199.

manner and arrives at its destination for presentment within a reasonable time. And there is authority to this effect.²⁶

But the courts do not look with favor upon the practice which is indulged in by banks of sending checks delivered to them for collection to the place where the drawee is located through an indirect chain of correspondent banks. In a Nebraska case the plaintiff indorsed in blank and deposited a check with the defendant bank on May 31st, drawn on a bank located in a town twenty-seven miles distant. The defendant forwarded the check through two other banks and it was presented on June 5th. The drawee being then insolvent, the check was not paid. It appeared that the check would have been paid if promptly presented. In an action by the plaintiff to recover the balance claimed due, it was held that the check had not been presented within a reasonable time to charge the plaintiff as indorser and that the plaintiff was entitled to judgment. Defendant contended that it was customary to forward checks for collection in this manner, but the court held that even if such was the custom it did not relieve the defendant from liability.²⁷

The presentment of the check to the drawee for payment should certainly not be delayed by sending it over an unnecessarily circuitous course. A delay of this kind may not only result in discharging the drawer and indorsers from liability upon the check, but may cause the check to operate as a complete payment and satisfaction of the debt for which it was originally delivered,²⁸ and there is no doubt that, under such circumstances, the owner of the check would have a cause of action against the bank in which it was deposited, or its correspondent banks, for the loss thus occasioned.

§201. Right to Charge Back Uncollected Checks.—A bank in which a check is deposited for collection is entitled to charge it back to the account of the depositor and revoke the credit

26. *Givan v. Bank of Alexandria, Tenn.*, 52 S. W. Rep. 923. In this case it was said: "The rule is, where a check is drawn on a bank distant from the initial bank in which such check is placed for collection, the initial bank has a right to forward the check to the place of payment through its wonted channel of correspondence."

27. *First Nat. Bank v. Miller*, 37 Neb. 500.

28. See Section 8, *Payment by Check*, and Section 74, *Circuitous Routing of Checks Deposited for Collection*.

given therefor if it turns out that the check is worthless, unless the bank has been guilty of negligence, or has done something to mislead the depositor, or induce him to act to his injury; and the bank has this right even though it has credited the check to the account of the depositor as cash.²⁹ In other words, the act of the bank in crediting a check as cash and granting the depositor the right to draw against such credit is a mere gratuity and does not constitute it the owner of the check nor preclude it from charging back the amount of the check where the check is returned unpaid without negligence on the part of the bank.³⁰

Thus, if it appears, that a check deposited in a bank and forwarded for collection, is not paid because payment has been stopped by the drawer, the bank may charge the amount of the check back to the account of the depositor,³¹ and if in these circumstances the bank has permitted its depositor to withdraw the amount before receiving notice of the non-payment of the check it may recover the amount in an action against the depositor.³² Likewise the amount of a check may be charged back to a depositor where it is afterwards discovered that the payee's indorsement is a forgery,³³ or where the check

29. *National Commercial Bank v. Miller*, 77 Ala. 168; *National Gold Bank v. McDonald*, 51 Cal. 64; *Noble v. Doughton*, 72 Kan. 336, 83 Pac. Rep. 1048; *Stein v. Empire Trust Company*, 133 N. Y. Supp. 517; *Lyons v. Union Exchange Nat. Bank*, 150 N. Y. App. Div. 493, 135 N. Y. Supp. 121; *Bank of Big Cabin v. English*, 27 Okla. 334, 111 Pac. Rep. 386; *Union Safe Deposit Co. v. Strauch*, 20 Pa. Sup. Ct. Rep. 196; *Rapp v. National Security Bank*, 136 Pa. 426, 20 Atl. Rep. 508; *Winchester Milling Co. v. Bank of Winchester, Tenn.*, 111 S. W. Rep. 248; *Belsheim v. First Nat. Bank Wash.*, 137 Pac. Rep. 1055.

In *Winchester Milling Co. v. Bank of Winchester, Tenn.*, 111 S. W. Rep. 248 it was said: "The mere fact that the collecting bank credited him with the check as cash did not alter their relation (the agency of the bank for collection). This is done daily; indeed, it is the almost universal usage to credit such collections as cash, unless the customer making such deposit is in weak credit. If the check is unpaid, it is charged off again, and the unpaid check returned to the depositor."

30. *Belsheim v. First Nat. Bank, Wash.*, 137 Pac. Rep. 1055.

31. *Belsheim v. First Nat. Bank, Wash.*, 137 Pac. Rep. 1055.

32. *Union Safe Deposit Co. v. Strauch*, 20 Pa. Sup. Ct. Rep. 196.

33. *Stein v. Empire Trust Co.*, 133 N. Y. Supp. 517. Where the check bears a forged indorsement, the bank need not depend upon its right to charge back; the depositor in such case having no valid title to the check would have no right to enforce its payment, nor to retain the proceeds if collected by him. See Sections 138, 141.

was fraudulently raised before coming to the depositor's hands.³⁴ The bank may charge back the amount of a raised check, even though the check was collected before the fraudulent alteration was discovered and the depositor had been informed by a clerk of the bank that the check was "all right," whereupon the depositor paid the amount of the check to the person who indorsed the check to him. The clerk's assurance that the check was all right was limited to the fact of the payment of the check and did extend to its genuineness.³⁵

It is not to be supposed that a bank may charge back every check received by it and uncollected. As stated above it may be precluded from charging back uncollected checks by its own negligent acts. Thus, where a bank forwarded a check directly to the drawee and it was not paid because of the drawee's failure, it was held that the bank could not charge the amount against the depositor's account.³⁶ And there are cases in which a bank is not permitted to charge back uncollected checks even though the failure to collect the check has not in any way been due to the bank's negligence. The cases referred to are those which hold that a bank, receiving a check for collection, is liable to its depositor for the negligent acts or defaults of its correspondents to whom the check is forwarded for collection.³⁷

34. *Rapp v. National Security Bank*, 136 Pa. 426, 20 Atl. Rep. 508. In this case, plaintiff, a depositor in the defendant bank, received from a stranger a certified check for \$900.00 in payment for a small bill of goods. Before paying the balance to the stranger the plaintiff asked the advice of the cashier of the defendant bank who told him to have nothing whatever to do with the check. The cashier, however, stated that he would take the check for collection if the plaintiff wished and the plaintiff finally paid the balance to the stranger and deposited the check. It was discovered after collection that the check had been fraudulently raised before certification. It was held that the defendant was entitled to charge the amount back to the plaintiff. "It has never supposed" said the court, "that when a bank credits a depositor with the amount of a check left for collection, it may not be charged back to him in case it turns out to be worthless."

35. *Oppenheim v. West Side Bank*, 22 Misc. Rep. (N. Y.) 722.

36. *Pinkney v. Kanawha Valley Bank*, W. Va., 69 S. E. Rep. 1012. For other cases under this rule see, *supra*, §195-199.

Cases involving the charging back of checks deposited by the holder in the bank on which they are drawn will be found in §188.

37. See, *infra*, §203-207. As to right of bank to charge back lost checks, see, *infra*, §202.

Briefly stated, the rule as to the right of a bank to charge back uncollected checks is this: The bank may charge back a check provided the failure to collect it has not been due to its negligence, or to the negligence of any correspondent bank for which it may be held liable, and its right to so charge back is not affected by the fact that the check in question has been credited to the depositor as cash.

§202. Right of Bank to Charge Back Amount of Lost Check.—

Where a check is indorsed in blank and deposited in a bank, the depositor being given credit for the amount as cash upon the books of the bank, it is held that the bank will not be permitted to charge back the amount of the check to the depositor's account if the check is not collected, where the non-collection is due to the fact that the check is lost in the mail.³⁸ When paper delivered to a bank is lost there is a presumption of negligence on the part of the bank and the burden is on the bank to rebut the presumption by proof that it was guilty of no negligent act.³⁹

§203. Liability of Bank for Defaults of Correspondent.—In the collection of checks, deposited with a bank and forwarded to a correspondent bank, it frequently happens that the collection is not carried to a successful termination because of some negligent act or default on the part of the correspondent bank. The correspondent bank may be negligent in the matter of presenting the check for payment, or in taking other necessary steps to charge the drawer and indorsers of the check, or, having made the collection, it may become insolvent before the proceeds are remitted. The question then arises as to whether the depositor of the check is entitled to hold the initial bank responsible for the loss. The rights of the depositor in this regard depend upon the jurisdiction in which the question comes up, for there is an irreconcilable conflict among the authorities as to whether a bank, which receives a check for collection and

38. *Spooner v. Bank of Donalsonville, Ga.*, 82 S. E. Rep. 625; *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. Rep. 387; *Walton v. Riverside Bank*, 29 Misc. Rep. (N. Y.) 304, 60 N. Y. Supp. 519.

39. *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520, 22 So. Rep. 976; *American Express Co. v. Parsons*, 44 Ill. 312; *Chicopee Bank v. Seventh Nat. Bank*, 8 Wall. (U. S.) 421, 19 L. Ed. 422.

forwards it in the ordinary course of business through the hands of one or more correspondent or agent banks, is liable to the depositor of the check for the negligent acts or defaults of the agent bank. According to one line of authorities, if the initial bank exercises proper diligence in the selection of suitable agents to which to entrust the collection of the check, it fulfills its obligation to its depositor in this regard and cannot be held liable by the depositor for any default or negligent act committed by any such agent. These decisions point out that the depositor of an out-of-town check can have no reason to believe that the bank will send out a special messenger for the purpose of making the collection and knows that the collection will be accomplished in accordance with the usual banking customs by forwarding the check to some correspondent bank. The depositor, therefore, impliedly agrees to this method of collection. The courts which hold this view maintain that a different rule would bring about the inequitable result of making the initial bank an insurer of checks deposited with it for collection.

Squarley opposed to this doctrine is the line of decisions which holds that a bank may be held accountable for the acts or omissions of the correspondent banks to which it sends paper for collection. These authorities maintain that this is but an application of the well established rule of the law of agency that every person who acts through an agent is responsible for the agent's defaults. They point out that it is customary for the bank to receive compensation for, or be benefited in some other manner by, the handling of out-of-town collections. The bank does not consult the depositor in the selection of the agents through which the collection is to be handled and gives him no voice in determining who they shall be. Furthermore, if the bank desires to avoid liability for the acts or omissions of its agents, it is simple enough for the bank to enter into an express stipulation to that effect with its depositor. Upon these grounds this line of authorities emphatically maintains that a bank which undertakes to collect is chargeable with the defaults of correspondents employed in making the collection.

Apart from the conflict among the decisions, there is some controversy among the writers on this branch of the law, as to which of the two lines of authorities referred to represents the better and more sound doctrine. Opinions on this question,

however, merely add to the confusion which already exists on the question. But it may be well to suggest that it is advisable for banks, in those states which hold the initial bank liable for its correspondents' defaults, and those states in which the question has not been determined by the courts, to have an express understanding with its depositors that it shall be responsible to them only for the selection of proper agents for collection and, that having made such a selection, it shall not be responsible for the agents' defaults.⁴⁰

§204. Bank Held Not Liable for Correspondent's Defaults.—

The weight of authority on the question of liability of a collecting bank for the default of its correspondents or agents, slightly favors the rule against such liability, and lays down the rule that the initial bank is liable to the depositor for the default of a correspondent bank only in the event that it has failed to exercise reasonable care in the selection of its agents and correspondents.⁴¹

40. See, *infra*, §207.

41. *Connecticut.* East Haddam Bank v. Scovil, 12 Conn. 303.

Illinois. Fay v. Strawn, 32 Ill. 295; Aetna Ins. Co. v. Alton City Bank, 25 Ill. 221; Carlinville Nat. Bank v. Wilson, 78 Ill. App. 339; Waterloo Milling Co. v. Kuenster, 158 Ill. 259.

Indiana. Irwin v. Reeves Pulley Co., 20 Ind. App. 101, 48 N. E. Rep. 601.

Iowa. Guelich v. National State Bank, 56 Ia. 434, 9 N. W. Rep. 328.

Kentucky. Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. Rep. 38; Second Nat. Bank v. Merchants' Nat. Bank, 111 Ky. 930, 65 S. W. Rep. 4.

Louisiana. Hum v. Union Bank, 4 Rob. (La.) 109.

Maryland. Citizens' Bank v. Howell, 8 Md. 530.

Massachusetts. Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330.

Mississippi. Third Nat. Bank v. Vicksburg Bank, 61 Miss. 112.

Missouri. Daly v. Butchers & Drovers' Bank, 56 Mo. 94.

Nebraska. First Nat. Bank v. Sprague, 34 Neb. 318, 51 N. W. Rep. 846.

North Carolina. Planters & Farmers' Nat. Bank v. First Nat. Bank, 75 N. C. 534.

Tennessee. Bank v. Cummings, 89 Tenn. 609, 18 S. W. Rep. 115; Bank of Louisville v. First Nat. Bank, 67 Tenn. 101; Winchester Milling Co. v. Bank of Winchester, Tenn., 111 S. W. Rep. 248.

Wisconsin. Stacy v. Dane County Bank, 12 Wis. 629.

The following quotations from the opinions in some of the leading cases on this question indicate the grounds upon which the conclusion has been reached that the collecting bank is not liable for its agent's defaults:

"When a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled that, if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of the residence of the promisor, and the same rule shall then apply as if, on the face of the note, it was payable at that place."⁴²

"Under such circumstances, it cannot justly be claimed that the plaintiffs (initial bank) should have become insurers against the defaults of their correspondents. Such a doctrine would be as inequitable as it might be oppressive and ruinous to banks who are merely the medium through which the holders of bills and drafts, payable in other states, transmit them for collection. If they act in good faith in the selection of an agent to protect the interests of the holder of the bill, in cases where it is obvious an agent must be selected for such purpose, what principle of justice or commercial policy requires that they should be held liable for any neglect of duty on the part of such agent?"⁴³

"The contract implied by the reception of the note against a party residing at a distance from its place of business was not absolutely to make due presentment and give due notice, but to place the note in the hands of some competent and responsible agent doing business at the residence of the maker."⁴⁴

"They do not undertake themselves to collect the bills, but to intrust them to other banks at the place payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore au-

42. *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330.

43. *East Haddam Bank v. Scovil*, 12 Conn. 303, 314.

44. *Stacy v. Dane Co. Bank*, 12 Wis. 629, 634.

thorizes the bank with whom he deals to do the work of collection through another bank.”⁴⁵

“The plaintiffs knew that the bank could not go personally to Natchez (place of payment), nor send its cashier there, because his absence would have been extremely inconvenient to them, and his traveling expenses burdensome to plaintiffs; so that they could not expect that the defendants would resort to any other than the ordinary mode of collection, to wit, the agency of a bank at the place of payment.”⁴⁶

“When a customer deposits with a bank, a note, bill of exchange, certificate of deposit, check, etc., for collection at a point distant from the location of the bank, he must know the bank cannot send one of its officers or agents to such point to make the collection. He is presumed to know the method employed by banks in making such collections. He knows that the bank must select some other bank or agency to aid in accomplishing the undertaking imposed on it. He has made the bank his agent for that purpose. He has employed the bank to do, through its method of making collection, that which would cost him much time and money to do himself. When he so engages the bank, and makes it his agent to make the collection, he does so with the implied understanding that the bank will follow the customary method in making such collections, which necessitates the selection of agents or correspondents at other points to carry out the undertaking; and the bank can only be held responsible for the exercise of due care and diligence in making such selection.”⁴⁷

§205. Bank Liable for Correspondent's Defaults.—The rule that a collecting bank is liable for the defaults of its agents has been enforced by the United States Supreme Court, and also by the courts of the following states; Arkansas, Georgia, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Ohio, Pennsylvania, South Carolina and Texas, and in these jurisdictions it has been held that where the correspondent bank becomes insolvent while the proceeds of the collection are in its hands, neglects to take proper steps to charge the parties

45. *Guelich v. National State Bank*, 56 Ia. 434, 9 N. W. Rep. 328.

46. *Hum v. Union Bank*, 4 Rob. (La.) 109.

47. *Farmers' Bank & Tr. Co. v. Newland*, 97 Ky. 464, 31 S. W. Rep. 38.

to paper sent to it for collection, or is guilty of some other default or negligent act, the initial bank is directly responsible to the depositor.⁴⁸

"As long as banks and bankers hold themselves out to collect such bills or drafts for a compensation, or their advantage," remarks the Supreme Court of Michigan⁴⁹ they ought to be

48. *United States*. Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722.

Arkansas. Second Nat. Bank v. Bank of Alma, Ark., 138 S. W. Rep. 472.

Georgia. Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. Rep. 717.

Michigan. Simpson v. Waldby, 63 Mich. 439, 30 N. W. Rep. 199.

Minnesota. Streissguth v. National German-Am. Bank, 43 Minn. 50, 44 N. W. Rep. 797, 7 L. R. A. 363; Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 91 N. W. Rep. 257.

Montana. Power v. First Nat. Bank, 6 Mont. 251, 12 Pac. Rep. 597.

New Jersey. Titus v. Mechanics' Nat. Bank, 35 N. J. L. 588; Davey v. Jones, 42 N. J. L. 28.

New York. Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215; Castle v. Corn Exch. Bank, 148 N. Y. 122, 42 N. E. Rep. 518; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Naser v. First Nat. Bank, 116 N. Y. 492; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 27 N. E. Rep. 849.

North Dakota. Commercial Bank v. Red River Nat. Bank, 8 N. D. 382, 79 N. W. Rep. 859.

Ohio. Reeves-Stevens & Co. v. Bank of Ohio, 8 Ohio St. 465.

Pennsylvania. Morris v. First Nat. Bank, 201 Pa. 160, 50 Atl. Rep. 1000. See also Bradstreet v. Everson, 72 Pa. 124; Morgan v. Tener, 83 Pa. 305; Siner v. Stearne, 155 Pa. 62.

South Carolina. City National Bank v. Cooper, 91 S. C. 91, 74 S. E. Rep. 366.

Texas. State Nat. Bank v. Thomas Mfg. Co., 17 Tex. Civ. App. 214, 42 S. W. Rep. 1016.

Where a depositor unites with a bank in the selection of a correspondent he cannot afterwards deny that the correspondent is his agent and fasten upon the bank responsibility for the correspondent's negligence. *City Nat. Bank v. Cooper*, 91 S. C. 91, 74 S. E. Rep. 366.

49. *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. Rep. 199.

"In depositing his paper the customer ordinarily surrenders all control of it, and has nothing to do with the means taken by the bank to collect. On the other hand, the bank undertakes the collection for its own profit, takes its own methods and selects its own agents. It seems therefore illogical to regard the collecting bank or any of the intermediate banks as agents of the depositor, or to put upon him loss due to their default." *City Nat. Bank v. Cooper*, 91 S. C. 91, 74 S. E. Rep. 366.

governed by the same rules of law that apply to other persons, and if they wish to avoid responsibility, it is very easy for them to accept such business only on a special agreement as to their duties and liabilities. Failing to do this, I think they must, in taking such bills or drafts, be responsible, as other business men are, for the misconduct of their selected agents at home or abroad."

In the case of *Bailie v. Augusta Savings Bank*,⁵⁰ it was said by the Supreme Court of Georgia; "In the selection of the correspondent, the customer for whom the collection is to be made is not consulted. As a rule, he does not know the name or financial standing of the correspondent, and it is not contemplated that they shall have any communication with each other."

And on the question here involved, the Supreme Court of Minnesota made the following observation, "The plaintiffs had no voice in the selection of appellant's agent or correspondent and it is difficult to see why banks and banking houses should be exempt from the application of a cardinal and well-established principle of law that every person is liable for the acts of such agents as may be appointed or designated by him to transact such business as he has undertaken to perform for others. The appellant, having undertaken the collection of the paper, stands in the attitude of an independent contractor, who, having unrestrained liberty so to do, has designated a subagent, and is therefore answerable for his neglect, failure, or default."⁵¹

§206. Liability of Bank for Default of Correspondent under Statute.—In Florida it is expressly provided by statute that a collecting bank is not responsible for the defaults of its correspondents. The statute in question reads as follows: "When a bank receives for collection any check, draft, note, or other negotiable instrument, and forwards the same for collection as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part."⁵²

50. 95 Ga. 277, 21 S. E. Rep. 717.

51. *Streissguth v. National German-Am. Bank*, 43 Minn. 50, 44 N. W. Rep. 797.

52. Chapter 5951, approved June 8th, 1909. This statute overrules earlier Florida decisions, *Brown v. People's Bank for Savings*, 59 Fla. 163, in which it was held that a bank receiving a check for collection was

The statutes on this subject exhibit the same lack of harmony as do the decisions. In Georgia it is provided by statute that, in the absence of contract, express or implied, a collecting bank is liable for the defaults of its correspondents, to whom paper is entrusted for collection. In an action against a bank for the negligence of itself and its agents in collecting a check deposited with it, it was held that it was proper to submit to the jury the question whether there was an implied contract exempting the bank, it appearing that the check in question had been acknowledged on a card by the defendant stating that the defendant assumed no responsibility for the defaults of its collecting agents, and that previous deposits by the plaintiff had been similarly acknowledged. But it was held error for the court to instruct the jury as to the effect of an express contract, there being no evidence to establish an express contract, and for this error a judgment for the defendant was reversed.⁵³

§207. Contract Exempting Bank from Liability for Correspondent's Defaults.—A bank which receives a check for collection may relieve itself from liability for the negligent acts of correspondent banks employed in making the collection by an express agreement to that effect with the depositor.⁵⁴

The usual manner of entering into such an agreement with a depositor is to have the stipulation exempting the bank printed upon the deposit slip handed in by the depositor at the time he deposits his checks. It has been held that the words on the deposit slip, "All items credited subject to final payment," mean that the credit is given subject to the final payment to the bank, and that the credit may be withdrawn if the item is not paid to the bank. In the case where these words were printed upon the deposit slip, it was held that the bank was not liable to its depositor where the check in question was collected

answerable to the depositor where the bank to which the check was forwarded and which collected the amount, failed before remitting the proceeds.

53. *Youmans Jewelry Co. v. Blackshear Bank*, Ga., 80 S. E. Rep. 1005.

54. *California Nat. Bank v. Utah, Nat. Bank*, 190 Fed. Rep. 318; *Youmans Jewelry Co. v. Blackshear Bank*, Ga., 80 S. E. Rep. 1005; *Falls City Woolen Mills v. Louisville Nat. Banking Co.*, Ky., 140 S. W. Rep. 66; *Bank of Rocky Mount v. Floyd*, 142 N. C. 187, 55 S. E. Rep. 95; *First Nat. Bank v. City Nat. Bank*, Tex., 166 S. W. Rep. 689.

by a correspondent bank which failed while the proceeds of the collection were in its hands.⁵⁵

Where the check is sent by mail to the bank instead of being delivered by the depositor to the receiving teller and is acknowledged by a card or letter containing a provision exempting the bank from liability for its correspondents' defaults, it must appear that there was an express or implied assent on the part of the depositor in order that the stipulation may be given effect. Such an assent may usually be implied where it appears that it has been the practice for the depositor to send his checks to the bank by mail and for the bank to acknowledge them by card or letter containing the exempting stipulation. In one case it appeared that the defendant bank in accordance with its uniform practice acknowledged a check received from the plaintiff in the following terms; "In receiving checks, drafts, or other paper on deposit for collection, the Utah National Bank acts only as agent, and assumes no responsibility for the acts, omissions, neglect, or default of agents or subagents at other points, or for items lost while in transit. Any credit allowed for items on other banks or parties is only provisional until the proceeds thereof in money shall have been actually received by said bank." It was held that this form of acknowledgment exempted the bank from liability for the negligent acts of correspondents, it appearing that the defendant was in the custom of acknowledging checks in this manner and that the plaintiff made no objection to the terms specified.⁵⁶

In Georgia, by statute a collecting bank is liable for the defaults of its agents or correspondents to whom paper is entrusted for collection "in the absence of contract, express or implied, to the contrary." In an instance coming up under this statute it appeared that the plaintiff mailed a certain check to the defendant bank which the bank acknowledged by a card upon which was printed the following: "This bank assumes no responsibility for any loss in the mail, nor for any neglect or default of collecting agents." It appeared that the plaintiff had on many previous occasions mailed checks to the defendant for deposit and that in each instance he had received an ac-

55. *Falls City Woolen Mills v. Louisville Nat. Banking Co.*, Ky., 140 S. W. Rep. 66.

56. *California Nat. Bank v. Utah Nat. Bank*, 190 Fed. Rep. 318.

knowledge upon a card containing the words quoted above. The court held that while the plaintiff's failure to object within a reasonable time might be sufficient to show an implied assent to the stipulation on the card, the evidence was not sufficient to establish an express contract between the parties exempting the bank from liability for the defaults of its correspondents. It was held that whether or not there was an implied contract exempting the bank was a proper question for the jury to determine.⁵⁷

While stipulations of this character will relieve a bank from liability for the negligence of its correspondents, they will not exonerate it from its own negligence or misconduct. Such a stipulation, for instance, will not absolve a bank from liability for loss occasioned by its negligent act in sending a check left with it for collection directly to the bank on which it is drawn.⁵⁸

§208. Liability of Bank for Acts of Notary.—Upon the question whether a bank is liable for the acts of a notary employed by it to protest paper, there is a conflict of authority. The courts of New York and New Jersey have held that a bank which assumes the duty of collecting agent is liable to its principal for the default or neglect of a notary employed by it in making protest.⁵⁹

In a case where a notary by mistake read an indorser's name as "Frederick Darcy" instead of "Frederick Davey," and, in consequence of the mistake, the notice never reached the indorser, the court, in holding the bank liable, said: "The notary, being the agent of the bank, is chargeable in law with the knowledge which the bank had, and must be presumed to have known who the indorser was. It was the duty of the agent, on behalf of his principal, to send notice to Frederick Davey, and his failure so to do must be treated as the negligence of the bank. A bank which assumes the duty of a collecting agent is absolutely liable for any negligence or default of a notary or

57. *Youmans Jewelry Co. v. Blackshear Bank*, Ga., 80 S. E. Rep. 1005.

58. *Bank of Rocky Mount v. Floyd*, 142 N. C. 187, 55 S. E. Rep. 95. See also, *supra*, §195-199.

59. *Davey v. Jones*, 13 Vroom (N. J.) 28; *Ayrault v. Pacific Bank*, 47 N. Y. 570.

correspondent, as well as of its own immediate servants in relation to it."⁶⁰

But the weight of authority on this question is to the effect that a bank is not liable for the negligence or misconduct of the notary, whose services it engages in protesting paper held by it for collection, and that its responsibility in this regard terminates when it turns the instrument over to a suitable notary for protest. The reason usually given for excusing a bank from liability for the negligent or wrongful acts of the notary acting for it in the protest of paper, is that the notary is not a mere agent or servant of the bank, but is a public officer sworn to discharge his duty properly.⁶¹

The Supreme Court of the United States, in passing on a question of liability of this character, has made the following statement: "It is enough here that the notary was not, in this matter, the agent of the bankers. He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands in order that such steps should be taken by him as would bind the endorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty, he alone was liable; the bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection, in the conduct of a suit brought upon them."^{61a}

It has been held that the fact that a notary to whom a bank

60. *Davey v. Jones*, 13 Vroom (N. J.) 28.

Where a bank delivered a bill of exchange to a notary the day before maturity and the notary protested it on that day, it was held that the bank was liable to the owner of the bill. *American Express Co. v. Haire*, 21 Ind. 4.

61. *Britton v. Niccolls*, 104 U. S. 757; *May v. Jones*, 88 Ga. 308, 14 S. E. Rep. 552; *First Nat. Bank v. German Bank*, 107 Ia. 543, 78 N. W. Rep. 195; *Bowling v. Arthur*, 34 Miss. 41.

In giving its reasons why a bank is not liable for the negligent acts of a notary employed by it, the Supreme Court of Georgia has said; "He is under a higher control than that of a principal. He owes duties to the public which must be the supreme law of his conduct. Consequently when he acts in his official capacity the bank no longer has control over him and cannot direct how his duties shall be done. If he is guilty of misfeasance in the performance of an official act the bank is not liable." *May v. Jones*, 88 Ga. 308, 14 S. E. Rep. 552.

61a. *Britton v. Niccolls*, 104 U. S. 757.

delivers a collection item for protest is an officer of the bank, does not render the bank responsible for his defaults.⁶²

§209. What may be Received in Payment.—In the absence of any agreement as to the manner in which a collection is to be made between a bank, which undertakes the collection of a check, and the person or bank, from whom the check is received, the collecting bank is authorized to collect the check in money only. If, instead of making the collection in money, the collecting bank receives the drawee's check or draft and for some reason it is unable to collect such check or draft it is liable to the principal for whom it acted in making the collection, just as though it had collected the amount due in money. In other words, the collecting bank which receives commercial paper in payment of a check entrusted to it for collection assumes the risk and must account to its principal whether the commercial paper thus received is eventually paid or not.⁶³

62. *May v. Jones*, 88 Ga. 308, 14 S. E. Rep. 552; *First Nat. Bank v. German Bank*, 107 Ia. 543, 78 N. W. Rep. 195; *Contra*, *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. Rep. 239.

In *First Nat. Bank v. German Bank*, 107 Ia. 543, 78 N. W. Rep. 195, it was said: "A notary is a public officer, appointed by the chief magistrate of the state, is under bond for the faithful performance of his duties as such, and keeps a public record of his acts, certified copies of which may be received in evidence. Code, §373 *et seq.* He is not a mere agent of the bank, but a public officer sworn to properly discharge his duties to the public. As such officer the bank may not control his acts, nor dictate in what manner he shall perform his duties. If guilty of malfeasance in the performance of an official act, he, and not the bank, is responsible. That this notary was also an employee of the bank can make no difference. When acting as such officer, he was not discharging his duties as servant. The positions were distinct, and his acts in the capacity of an officer of the state had no connection with the services he owed the bank."

63. *Ward v. Smith*, 7 Wall. (U. S.) 447; *Bradley Lumber Co. v. Bradley County Bank*, 206 Fed. Rep. 41; *Holder v. Western German Bank*, 136 Fed. Rep. 90; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, 36 N. E. Rep. 1029; *Graydon v. Patterson*, 13 Iowa 256; *Bank of Indian Territory v. First Nat. Bank*, 109 Mo. App. 665; *National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320, 52 S. W. Rep. 265; *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412; *Nunnemaker v. Lanier*, 48 Barb. (N. Y.) 234; *Merchants Nat. Bank v. Goodman*, 109 Pa. 422, 2 Atl. Rep. 687; *Fifth Nat. Bank v. Ashworth*, 123 Pa. 212, 16 Atl. Rep. 596; *Second Nat. Bank v. Cummings*, 89 Tenn. 609.

The conceded rule of law is that if a bank receives a draft for collection,

In these cases the loss usually occurs because of the fact that the bank from which the collection is made fails before the paper, which it gives in payment of the check drawn against it, is presented for payment. When a bank collects a check in the manner described and the paper received in payment is not paid, the law presumes that the owner has been damaged by the bank's action and dispenses with proof thereof.⁶⁴

In a New York case, decided in 1867, the defendant received for collection, a draft upon a New York trust company which was surrendered in exchange for the trust company's uncertified check on another bank. Upon presentment, payment of the check was refused because of the suspension of the trust company. It was held that the defendant bank was liable.⁶⁵ And in another New York case, decided in 1882, it appeared that a bank in New York City which held for collection a draft drawn on a firm of private bankers, took the drawee's check in payment of the draft. This check was presented on the following day but was dishonored because of the failure of the banking firm. It was likewise held in this case that the collect-

and takes in payment a check from the party who is bound to pay such draft, and surrenders the same to him, such collecting bank is liable to its principal for the amount of the check, as an agent authorized to receive money has no implied power to receive a check in payment. *Bank of Indian Territory v. First Nat. Bank*, 109 Mo. App. 665.

A collecting agent is authorized to receive money only, and has no implied power to take a check or anything else in payment. If it takes a check and surrenders the item held for collection, it makes the check its own, and becomes liable to the principal for the amount of the check, as if it had received cash, with interest from the date of its receipt. *National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320, 52 S. W. Rep. 265.

It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection it must return him the check or the money. It is also equally clear that if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check or other obligation in lieu thereof, its liability to the depositor is fixed, as much so as if it had received the cash. It has no right, unless specially authorized to do so, to accept anything in lieu of money. *Fifth Nat. Bank v. Ashworth*, 123 Pa. 212, 16 Atl. Rep. 596.

On this subject see also, *infra* §225.

64. *National Bank of Commerce v. American Exch. Bank*, 151 Mo. 320, 52 S. W. Rep. 265.

65. *Nunnemaker v. Lanier*, 48 Barb. (N. Y.) 234.

ing bank was guilty of negligence in not collecting the draft in money and was liable to the bank for which it acted as agent.⁶⁶

The facts in *Fifth Nat. Bank v. Ashworth* were these: On May 20th, 1884, Ashworth, the plaintiff, received a check for \$2,622.25, drawn on the Penn Bank of Pittsburg. He deposited it the same day in the Fifth National Bank of Pittsburg, the defendant in this action. The check was presented through the clearing house the following day, but the Penn Bank closed its doors before noon of that day and this check, with others presented at the same time, was sent back to the defendant. Later the Penn Bank temporarily resumed business and on the 24th the defendant bank presented the check again, this time receiving a cashier's check for the amount. But the Penn Bank closed its doors for good before the cashier's check could be presented and it was not collected. It was held that the defendant bank was liable to its depositor. "When the payment of the check in question," said the court, "had been refused by the Penn Bank, and it had been duly protested, the Fifth National Bank of Pittsburg, in this case the collecting bank and the defendant below, could have relieved itself from liability by returning the dishonored check to the plaintiff below, who had deposited it; or, it might, perhaps, have called upon the latter for instructions as to any further proceedings and had it received and followed such instructions I am unable to see how any liability could have attached to it. Neither of these modes was pursued. The defendant retained the check and made a further attempt to collect it."⁶⁷

When a bank is entrusted with the collection of a check it does not comply with its obligations to the owner of the check by taking the drawee's certification in place of cash. This is brought out in a New York case in which it appeared that the plaintiff drew a check payable to the order of the defendant bank and deposited it in the defendant bank, the amount being credited as cash in his pass book and on the books of the defendant. Later in the day the check was presented to the drawee which refused to pay cash but offered to, and did, certify the check, making it payable at another bank. The check was immediately presented at the bank where it was

66. *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412.

67. *Fifth National Bank v. Ashworth*, 123 Pa. 212, 16 Atl. Rep. 596.

made payable, but payment was refused because it was after banking hours. The next day the drawee bank failed. The depositor brought suit against the defendant to recover the amount of the check. It was held that the defendant should not have had the check certified but should have treated it as dishonored and should have given notice to its depositor to enable him to determine what steps to take for his own protection.⁶⁸

§210. Custom to Receive Draft in Payment of Check.—It is well known that in certain localities banks entrusted with the collection of checks and drafts, receive the drawee's checks or drafts in payment thereof to such an extent that there may be said to be a custom to that effect. In some instances banks, which have handled a collection in this manner, have attempted to defend an action by the owner of the check and to meet his contention that such method of collection constitutes negligence, on the ground that receiving the drawee's check or draft instead of insisting upon money is justified by custom. While it has been held that such a custom is unreasonable and invalid and that, therefore, it cannot be relied upon by the collecting bank as a defense,⁶⁹ it has been decided in some jurisdictions that a collecting bank is justified by usage or custom in receiving as payment the check or draft of the debtor upon another bank, and it is believed that these cases represent the fairer and more equitable doctrine.⁷⁰

68. *Lyons v. Union Exchange Nat. Bank*, 150 N. Y. App. Div. 493, 135 N. Y. Supp. 121.

69. *National Bank of Commerce v. American Exch. Bank*, 151 Mo. 320, 52 S. W. Rep. 265. In this case a national bank in Kansas City received from a correspondent for collection, a \$9,000 draft which it surrendered to the drawee upon receipt of his check, after banking hours, in payment, which check it placed in the clearing house for collection the following day, this course of procedure being in accordance with the prevailing custom among the banks in Kansas City in regard to such collections. This check was dishonored. In a suit by the Kansas City bank to recover back the amount which it had remitted to its correspondent, upon receipt, and before dishonor, of the debtor's check, it was held that the custom relied on was invalid and that recovery should be denied.

70. *First Nat. Bank v. First Nat. Bank*, Tex., 134 S. W. Rep. 831; *Jefferson Co. Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. Rep. 338.

Where there is a custom to that effect, a bank may receive its own certi-

The defendant bank, in an instance of this kind, sent certain checks to the plaintiff bank for collection. The latter bank presented them to the drawee, the Citizens' Bank of Clarendon, received a draft in payment and sent its own check to the defendant. The draft was worthless because of the insolvency of the Citizens' Bank and before it could be collected the Citizens' Bank closed its doors. The plaintiff called up the defendant on the telephone, before the check sent to the defendant had been received, and the defendant agreed to return the check. But instead of returning the check the defendant bank had it cashed. The plaintiff showed that there was a custom among banks to accept drafts from drawee banks in payment of checks sent forward for collection, and it appeared here that the checks would not have been paid in money had money been demanded. It was held that the plaintiff was not negligent in not demanding cash from the drawee and that it could recover from the defendant.⁷¹

In *Jefferson County Savings Bank v. Commerical Nat. Bank* it was held that it was a reasonable custom for local banks to accept, in payment of drafts sent to them for collection, certified checks on one of their own number in good standing, to present these checks each day at 11 A.M. and to leave them for examination. The plaintiff bank in Birmingham, Ala., sent to the defendant bank in Nashville, Tenn., a note and draft for collection. In payment of these the defendant received certified checks drawn on the Nashville Savings Bank, an institution in good standing. This was done in accordance with the well established usage or custom of the various banks of

ificates of deposit in payment of checks handled by it for collection. *British & American Mortgage Co. v. Tibballs*, 63 Iowa 468, 19 N. W. Rep. 319. But see *Francis v. Evans*, 69 Wis. 115, 33 N. W. Rep. 93; *Drain v. Doggett*, 41 Iowa 682.

In some cases it is held that a bank in the collection of a check may receive the drawee's check in payment thereof, provided the utmost diligence is used in presenting and collecting the substituted check. The effect of these decisions seems to be that the collecting bank must take immediate steps toward the collection of the substituted check and that it may not hold the substituted check until the day following its receipt and then present it through the clearing house. *Bank of Commerce v. Miller*, 105 Ill. App. 224; *Noble v. Doughton*, 72 Kan. 336, 83 Pac. Rep. 1048. See, *infra*, §225.

71. *First Nat. Bank v. First Nat. Bank*, Tex., 134 S. W. Rep. 831.

Nashville. The checks were left with the drawee at 11 A.M. on the next business day, also in accordance with the established custom of the Nashville banks, and at 2 P.M. the checks were returned unpaid because of the failure of the drawee bank. The plaintiff had no knowledge of this custom on the part of Nashville banks. It was held, nevertheless, that the plaintiff was bound by it and that it could not recover from the defendant.⁷²

§211. Collection of Checks Payable to Agent, Administrator, Trustee, Guardian, etc.—When a check is made payable to the order of an agent, administrator, or other person acting in a fiduciary capacity, representing money due the payee in such capacity, and nothing appears on the check indicating the fiduciary character of the payee, there is no doubt that a bank, in which the check is deposited for collection, is entitled to treat and deal with the payee as the owner of the check. There is no obligation upon the bank to make inquiries to find out whether the check belongs to the payee personally, or is held by him for the benefit of some third party. So far as the bank is concerned the payee has a right to indorse the check, deposit it to his credit and withdraw the proceeds on checks properly signed.⁷³

The question has been raised as to whether a collecting bank is justified in permitting the payee of a check, payable to him in a representative capacity, as a check payable "to the order

72. *Jefferson County Savings Bank v. Commercial National Bank*, 98 Tenn. 337, 39 S. W. Rep. 338. In the opinion it was said: "A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge or want of knowledge of its existence."

73. *Martin v. Kansas National Bank*, 66 Kan. 655, 72 Pac. 218, where the check, although representing money belonging to the principal, was made payable to the agent personally and was deposited to his own credit in a bank which had no notice of the principal's interest in the check. It was held, that the bank was protected in paying out proceeds upon checks signed by the agent.

As to payment of checks drawn by agents, trustees, etc., see, *supra*, §166, 167.

As to collection of checks bearing indorsement forged by agent, trustee, etc., or unauthorized indorsement, see, *supra*, §138-140.

of John Doe, Administrator," to deposit such check in an individual account and check out the proceeds. It is held that a bank may, with safety, permit such checks to be deposited to the individual credit of the person named therein as payee and that it is not liable to the person for whose benefit the funds were held, in the event that the depositor withdraws the money and wrongfully applies it to his own use. Depositing such a check to the individual credit of the payee is merely the equivalent of depositing the check to his credit as administrator, trustee, or agent, withdrawing the amount on properly signed checks and then depositing the proceeds in his personal account. The mere knowledge on the part of the bank that a check, payable to a person in a representative capacity, is deposited by him to his personal credit does not charge the bank with notice that he is acting dishonestly. The bank is entitled to assume that he will devote the proceeds to the use for which they were intended.⁷⁴

Thus, where a guardian deposited a check, payable to him as guardian, in an account in his individual name in the defendant bank, and afterwards drew out and misappropriated the money, it was held that the bank was not liable to the minor or the guardian's bondsmen.⁷⁵ And where a check, payable to a person as guardian, was indorsed by him for deposit to the credit of a corporation and deposited by the corporation to its credit, it was held that the bank was under no duty to question the title of the depositor and that the ward upon coming of age

74. *Safe Deposit & Trust Co. v. Diamond Nat. Bank*, 194 Pa. 334, 44 Atl. Rep. 1064; *Batchelder v. Central National Bank*, 188 Mass. 25, 73 N. E. Rep. 1024; *United States Fidelity & Guaranty Co. v. First National Bank*, Cal. App., 123 Pac. Rep. 352.

75. *United States F. & G. Co. v. First Nat. Bank*, Cal., 123 Pac. Rep. 352.

Where the abbreviation "Atty." followed the name of the payee in a check and the check recited that it was "in full for A. J. Kenney, Mortgage," it was held that a bank acted properly in allowing the payee to deposit the check in his own personal account, and that the bank was entitled to apply the proceeds of the check to the payment of an amount due it from the payee in the absence of any notice to the bank that the check was impressed with a trust. The abbreviation "Atty." written in the check after the payee's name did not necessarily import a trust nor could such effect be given to the words, "In full for A. J. Kenney, Mortgage," *Denton Nat. Bank v. Kenney*, 116 Md. 24, 81 Atl. Rep. 227.

could not hold the bank liable for the amount of the check.⁷⁶ And it has been held that a bank does not render itself liable in any way by permitting a trustee to deposit trust funds to his credit as agent.⁷⁷

In a California decision it was said: "In the absence of a law to the contrary, and our attention is called to none, there is no legal reason, whatever may be said as to the policy of so doing, which prevents a trustee from depositing the funds of a *cestui que trust* in a bank to his individual account. If he possesses the right to do so, it must necessarily follow that the bank has the right to receive the deposit, to his individual account, and, in the discharge of its duty to the depositor, subject to the limitation that the bank, having knowledge of the fiduciary character of the fund, cannot honor the check thereon drawn in its own favor in payment of personal indebtedness due from such depositor to it, pay it out in the usual course upon checks drawn thereon."⁷⁸

In a case where a check was payable to the order of the cashier of a bank "to deposit to credit of Henry W. Clagett Trustee," and the bank permitted the check to be deposited to Clagett's individual credit, instead of in his account as trustee, it was held that the bank was liable to Clagett's successor as trustee for the amount of the check, it appearing that

76. *Hood v. Kensington Nat. Bank*, 230 Pa. 508, 79 Atl. Rep. 714; In this case it was said that the bank was under no duty to supervise the acts of the guardian. The transaction was entirely consistent with the ordinary and proper conduct of business. The guardian might have used the corporation as a means of collecting the checks but the transaction was the same as though the guardian had obtained cash from the bank and paid that over to the corporation. The bank was not dealing with the guardian, but with its customer, the corporation. There were no circumstances present to arouse suspicion.

77. *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333. In this case the court said: "When money is deposited in a bank, it is immaterial, so far as the bank is concerned, in what capacity the depositor holds or owns it. The obligation of the bank is simply to keep it safely and return it to the proper person. Therefore, when a trustee deposits money in a bank to his credit as agent, the bank would be discharged by paying it back to the individual who made the deposit, and in the absence of knowledge or notice to the contrary, would have the right to assume that he would appropriate the money to its proper uses and trusts."

78. *United States F. & G. Co. v. First Nat. Bank*, Cal. App., 123 Pac. Rep. 352. See also, *supra*, §167.

Clagett had withdrawn and misapplied the money. The reason for holding the bank liable in this case was that the check contained an explicit instruction to the bank to place the funds to the credit of Clagett as trustee, which instruction it ignored. If the check had been deposited to the credit of Clagett as trustee, he might still have withdrawn and misapplied the proceeds, but it was held that this was no excuse for the bank's failure to follow the explicit instruction contained in the check and did not absolve it from the liability.⁷⁹

The rule that a bank may, without involving itself in liability permit a check, payable to a person as trustee or in some other fiduciary capacity, to be deposited to the personal credit of the payee is not adhered to in all cases. There are authorities to the effect that a bank renders itself liable in such case if the depositor withdraws the trust funds and applies them to his own use. It has been held that a bank, which permitted a commissioner to sell land to deposit to his individual credit a check payable to him as commissioner, was liable to the persons entitled to the proceeds of the check, where the depositor withdrew the funds and applied them to the payment of his private debts.⁸⁰ And it has been held that a bank is liable where it knowingly permits a guardian to deposit a check representing guardianship funds in his personal account and he afterwards draws out and uses the money for his own personal benefit.⁸¹

A bank should, under no circumstances, permit an agent to deposit to his own individual credit a check payable to the order of his principal.⁸² And a bank is put upon inquiry when there is presented to it for deposit to the individual credit of

79. *Duckett v. National Mechanics' Bank*, 86 Md. 400.

80. *Bank of Hickory v. McPherson*, Miss., 59 So. Rep. 934.

81. *United States F. & G. Co. v. People's Bank*, Tenn., 157 S. W. Rep. 414. In this case it was said: "The fact that Turner (guardian) promised the bank that he would faithfully administer the fund and would keep a true account thereof on his own private books, cannot be held to excuse the original conversion that made the misuse of the funds by the guardian easy and expeditious through checks drawn and signed with his personal name. Under the facts stated the bank took the risk of the guardian's making a proper disposition of the fund and keeping a true account thereof. This could not lawfully be imposed on the shoulders of his wards. The reliance of the bank upon the guardian's promises, under such circumstances, was simply folly."

82. See, *supra*, §139 and 140.

an officer of a corporation, a check signed by such officer in his official capacity, drawn against corporate funds and payable to his own order. The rule is that where a person receives from such an officer corporate obligations drawn by himself in his own favor, such person is put upon inquiry to determine whether the officer has the right to so use such obligations for his individual benefit.⁸³

This doctrine, however, has been limited in New York by a recent decision of the Court of Appeals, where the treasurer of a railroad company, authorized to sign checks, deposited to his credit in his own bank three checks on the railroad company's account in another bank, payable to his order, and later checked out and misappropriated the proceeds. It was held that while the initial bank was put upon inquiry by the form of the checks, it was not bound to look beyond the drawee bank. It met its obligation to make inquiry by presenting the checks to the drawee bank. The payment of the checks by the drawee was an assertion of the treasurer's authority to draw the checks, upon which the initial bank was entitled to rely. The initial bank having paid out the proceeds in reliance upon that assertion, could not be held liable at the instance of the corporation.⁸⁴

§212. Title to Checks Deposited in Bank.—In determining the rights of various persons in a check or its proceeds, after the check has been deposited in a bank, the courts constantly refer to the passing of title to the check from the depositor to the bank in which it is deposited. The question as to who is the owner of a check or its proceeds at a given time usually becomes prominent when a receiver is appointed for one of the banks co-operating in its collection; but this question also becomes one of importance in many other situations which arise in the collection of a check, such as an attempted garnishment by a creditor of the depositor, or a lien claimed by a correspondent bank as creditor of the initial bank.

83. *Havana Central Railroad Co. v. Central Trust Co.*, 204 Fed. Rep. 546; *Ward v. City Trust Co.* 192, N.Y. 61, 84 N. E. Rep. 585; *Squire v. Ordemann*, 194 N. Y. 394, 87 N. E. Rep. 435; *Niagara Woolen Co. v. Pacific Bank*, 141 App. Div. 265, 126 N. Y. Supp. 890.

84. *Havana Central Railroad Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, 92 N. E. Rep. 12; criticised in *Havana Central Railroad Co. v. Central Trust Co.*, 204 Fed. Rep. 546.

While a check is in circulation it is usually a simple matter to determine its ownership, but the moment it is deposited in a bank confusion reigns, and there is nothing, apparently, more elusive or difficult to locate than the title to a bank check in the process of collection. In the absence of an express agreement between the parties fixing the ownership of the check, and such agreements are rarely, if ever, met with, the intention of the parties is the guide-post and their intention must generally be determined by the circumstances attending the transfer. In the ordinary transaction between two individuals involving the transfer of a check, it is generally quite clear that the parties intend the title to the check to pass from one to the other. But when the check is deposited in the bank the intention of the parties is anything but clear. As a matter of fact, the question of title is rarely given consideration by the bank or depositor until something goes wrong and a controversy as to the ownership arises. And so little is said or done and so much is left to be understood, in connection with the ceremony of depositing a bank check, that the question of ownership frequently presents a difficult problem.

Many of the decisions lay down general rules, such as the rule that title to a check passes to a bank when the bank becomes absolutely responsible to the depositor for the amount,⁸⁵ or the rule that title passes when a check is indorsed in blank and credited as cash,⁸⁶ or the rule that title does not pass where a check is indorsed, "for collection,"⁸⁷ But these general rules are not satisfactory; a rule which works well in one case may be found to be inapplicable to another case because of slightly different circumstances, and much of the conflict of opinion which is found in the authorities on the general question of the passing of title is believed to be due to an attempt to apply

85. *South West Nat. Bank v. House*, 172 Mo. App. 197, 157 S. W. Rep. 809; *United States Nat. Bank v. Geer*, 53 Neb. 67, 73 N. W. Rep. 266.

86. *Dirnfeld v. Fourteenth St. Savings Bank*, 37 App. D. C. 11; *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. Rep. 729; *Security Bank of Minnesota v. North Western Fuel Co.*, 58 Minn. 141, 59 N. W. Rep. 987.

See also, *infra*, §213.

87. See, *infra*, §214.

In *Ayres v. Farmers & Merchants' Bank*, 79 Mo. 421, although the check involved was indorsed "for collection" it was held that title passed to the bank, it appearing that the check was immediately placed to the depositor's credit and that he was then entitled to draw against such credit.

these rules to cases which do not present similar facts and in which different issues are brought up.⁸⁸

As stated above, the question whether title to a check passes upon its deposit in a bank depends to a large extent upon the unexpressed intention of the parties as evidenced by the attending circumstances. The authorities show that the intention that the title to a check shall remain in the depositor is indicated by certain circumstances, such as the indorsement of the check "for collection," an agreement that the bank may charge back the amount of the check upon its noncollection, a failure to credit the check as cash, or a refusal to permit the depositor to draw against the deposit until the check is collected. On the other hand, the passing of title to the bank is indicated by a blank or unrestricted indorsement, crediting the amount to the depositor as cash, or permitting him to draw before collection. With the exception of the indorsement, "for collection" which the authorities universally hold does not operate to pass title,⁸⁹ none of the circumstances above referred to is conclusive. When it is considered that each case which comes up presents a combination of circumstances peculiar to itself and that these circumstances are frequently conflicting the difficulty of evolving general rules as to the passing of title is apparent.

§213. Check Indorsed in Blank and Credited as Cash—Many of the cases lay down the general rule that where checks are indorsed in blank, deposited in the usual and ordinary manner and credited by the bank to the account of the depositor as cash, without any agreement or understanding in reference to the transaction, other than such as the law implies, title passes to the bank, the relation of debtor and creditor is established, and the bank becomes legally liable as for so much money deposited.⁹⁰

This rule presupposes that there are no other facts or circumstances connected with the transaction, such as an understand-

88. *Scott v. W. H. McIntyre Co.*, Kan., 144 Pac. Rep. 1002.

89. See *supra* §48, foot note 46, and *infra*, §214.

90. *Burton v. United States*, 196 U. S. 283; *Dirnfeld v. Fourteenth St. Sav. Bank*, 37 App. D. C. 11; *Downey v. National Exch. Bank, Ind.*, 96 N. E. Rep. 403; *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. Rep. 729; *Noble v. Doughton*, 72 Kan. 336, 83 Pac. Rep. 1048; *Taft v. Quinsigamond National Bank*, 172 Mass. 363, 52 N. E. Rep. 387; *Lyons v. Union Exch. Nat. Bank*, 135 N. Y. Supp. 121, 150 N. Y. App. Div. 493;

ing that the bank may charge back the amount of the check in case it is not collected, tending to show that the parties did not intend title to pass; when such facts are present, evidence of them is admissible for the purpose of establishing that the parties intended title to the check to remain in the depositor.⁹¹

In *Burton v. United States*, which was a criminal prosecution involving the question whether checks, drawn on a St. Louis bank and indorsed and deposited by the payee in the usual manner in a bank in Washington, D. C., constituted a payment in Washington or St. Louis, it was held that the Washington bank became the owner of the checks at the time of their deposit and not a mere agent for collection and that title to the checks passed to the bank.⁹²

When a check is indorsed and deposited in the manner indicated, the fact that title thereupon passes to the bank confers upon the bank the right to control the collection of the check, and if the correspondent bank, to which the check is forwarded, is negligent in handling the collection, the depositor cannot main-

91. *Downey v. National Exch. Bank, Ind.*, 96 N. E. Rep. 403. *In re State Bank*, 56 Minn. 119, 57 N. W. Rep. 336.

As to effect of bank's right to charge back uncollected checks, see, *infra*, §216.

92. 196 U. S. 283. In the opinion it was said: "There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks were deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank and it became the owner thereof. It was in no sense agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank it became the owner of the check; it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of the defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of a check, and nothing more."

tain an action against the correspondent based on such negligence. The action in such case must be brought by the initial bank as owner of the check.⁹³

§214. Checks Indorsed " For Collection."—The indorsement of a check " for collection " does not pass title to the check. When the check is so indorsed and delivered to a bank, the bank takes it merely as the agent of the indorser for the purpose indicated and title to the check remains in the indorser.⁹⁴ Consequently, if a bank fails while a check indorsed " for collection " is in its possession, the check belongs to the depositor and he is entitled to it as against the receiver; or, if the check is collected after the receiver takes possession, the depositor is entitled to the proceeds.⁹⁵ But if the check is collected and the proceeds mingled with the other assets of the bank prior to its failure, the depositor is not preferred over other creditors of the bank, but must come in and share with them. In other words, the agency which is created by indorsing the check to the bank " for collection " terminates when the proceeds are received and become part of the general funds of the bank and the bank then becomes a mere debtor of the depositor for the amount collected.⁹⁶

In a New York case the plaintiff bank in New York City, being the owner of certain checks, sent them to a firm of private bankers which acted as its correspondent in Syracuse. The checks were indorsed "for collection for account of" the plaintiff bank, and were accompanied by a letter stating that the enclosures were " for collection and credit." It was customary for the correspondent to remit to the plaintiff once each week the

93. *Downey v. National Exch. Bank, Ind.*, 96 N. E. Rep. 403.

94. *United States Nat. Bank v. Amalgamated Sugar Co.*, 179 Fed. Rep. 718; *Cronheim v. Postal Telegraph Cable Co.*, 10 Ga. App. 716, 74 S. E. Rep. 78; *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561; *Tyson v. Western Nat. Bank*, 77 Md. 412, 26 Atl. Rep. 520; *Hoffman v. First Nat. Bank*, 46 N. J. Law 604; *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. Rep. 365; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207, 50 N. E. Rep. 723.

As to general characteristics of indorsements for collection, see, *supra*, §47-50.

95. *National Butchers & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. Rep. 1031.

96. *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 173; *National Butchers' & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. Rep. 1031.

amount standing to its credit and to charge back uncollected paper with protest fees. The correspondent failed, having in its possession the proceeds of certain items sent to it by the plaintiff and other items still uncollected. In an action against the assignee, it was held that the plaintiff could recover the amount of the paper collected after he took possession but could not recover amount collected prior to the assignment.⁹⁷

Not only is an indorsement "for collection" ineffectual to pass title to the check so indorsed, but it is notice to all subsequent parties dealing with the check that title thereto still remains in the depositor.⁹⁸ It follows that when a check indorsed "for collection" is forwarded to a correspondent bank and collected by the bank, the correspondent is not entitled, upon the failure of the initial or forwarding bank, to apply the proceeds of the check to the satisfaction of a debt owing to it from the initial bank.⁹⁹ In accordance with this rule it was held that, where a check indorsed "for collection" was forwarded by the initial bank to a correspondent, which credited it to the initial bank as cash and paid checks drawn by that bank against such credit, using up the credit entirely and leaving the account overdrawn, the correspondent bank could not apply the proceeds of the check against the overdraft of the initial bank.¹

§215. Checks Indorsed "For Deposit."—There is a conflict among the authorities as to whether a check indorsed "for deposit" and deposited in a bank becomes the property of the bank.² This conflict however is more apparent than real for, when the decisions are analyzed, it appears that the courts in construing indorsements of this kind are governed more by the intention of the parties, as evidenced by the circumstances attending the deposit, than by the mere form of the indorsement.

97. *National Butchers & Drovers' Bank v. Hubbell*, 117 N. Y. 384, 22 N. E. Rep. 1031.

98. *National Bank of Commerce v. Johnson*, 6 N. D. 180; *Hoffman v. First Nat. Bank*, 46 N. J. Law 604.

99. *Central Railroad Co. v. First Nat. Bank*, 73 Ga. 383; *Bank of Clarke County v. Gilman*, 81 Hun (N. Y.) 486, 30 N. Y. Supp. 1111.

1. *Bank of Clarke Co. v. Gilman*, 81 Hun (N. Y.) 486, 30 N. Y. Supp. 1111, *Aff'd*. 152 N. Y. 634.

2. See *supra*, §47.

In the Federal Courts it has been held that an indorsement "for deposit" does not pass title to the bank. In the case referred to, a city treasurer deposited checks in a bank indorsed "for deposit." The checks were immediately credited on his pass book but there was no agreement that they should be treated as cash, or that the credit should be drawn against before collection. Before the checks were collected a receiver was appointed for the bank and the proceeds subsequently came to his hands. It was held that title did not pass to the bank and that the depositor was entitled to the fund in the possession of the receiver.³

In a Georgia case it was held that, where a draft indorsed "for deposit" was deposited in a bank and forwarded to a correspondent, the depositor having the right to draw against the credit and, in fact, drawing against it, the property in the draft passed to the initial bank; this being the case, the proceeds of the draft in the hands of the correspondent bank were not subject to garnishment at the instance of a creditor of the depositor.⁴

These cases are readily distinguishable in that in the first case the depositor did not have the right to draw, indicating that the parties did not intend that title should pass to the bank, while in the second case the depositor was allowed to draw before collection, evidencing an intention that the bank should become the owner of the check and not merely a bailee or collecting agent.

§216. Effect of Bank's Right to Charge Back Uncollected Checks.—The fact that the bank is entitled, either under an express agreement or as the result of an understanding implied from a previous course of dealing, to charge back uncollected checks, throws light on the intention of the parties as to whether or not title is to pass to the bank. As a general rule title to the check deposited does not pass to the bank where there is an agreement or understanding to the effect that uncollected checks may be charged back to the depositor and the credit theretofore given revoked. This is so even though the check is indorsed in blank, credited to the depositor as a cash deposit, and the de-

3. *Beal v. City of Somerville*, 50 Fed. Rep. 647.

4. *Fourth Nat. Bank v. Mayer*, 89 Ga. 108, 14 S. E. Rep. 891.

positor is allowed to draw against the credit.⁵ It is sometimes held, however, that where a check is credited to the depositor's account and the depositor is allowed to draw against the credit, the title to the check passes to the bank notwithstanding the fact that the bank has reserved the right to charge back the check if not paid.⁶

Conflicts of this kind can frequently be reconciled by reference to the facts involved in the cases in which the two opposing rules are applied. For instance, the question as to who is the owner of the proceeds of a draft arises when such proceeds are in the hands of a correspondent bank and proceedings in garnishment are brought by a creditor of the depositor. If the proceeds belong to the depositor the creditor is entitled to maintain an action. If, on the other hand, the proceeds belong to the initial bank, that is, the bank in which the check was deposited, the creditor has no rights against the fund. In a case arising in Tennessee, it was held that the fact that it was understood that a bank in which a draft was deposited might charge back the amount if uncollected, indicated that the transaction was a deposit for collection and not a sale of the draft and that consequently the proceeds of the draft in the hands of a correspondent bank were subject to garnishment by a creditor of the depositor.⁷

5. *In re State Bank*, 56 Minn. 119, 57 N. W. Rep. 336; *Fanset v. Garden City State Bank*, S. D., 123 N. W. Rep. 686; *W. J. Barton Seed Co. v. Mercantile Nat. Bank*, Tenn., 160 S. W. Rep. 848.

6. *Ayres v. Farmers & Merchants' Bank*, 79 No. 421. In this case the check was forwarded by the initial bank to the drawee bank which was its correspondent. The drawee bank charged the check to the drawer and credited it to the initial bank in ignorance of the fact that the bank had in the meantime made an assignment for the benefit of its creditors. It was held that title to the check had vested in the initial bank and that the depositor could not recover in an action against the drawee. In *Flannery v. Coates*, 80 Mo. 444, which was based on the same transaction as the Ayres case, *supra*, it was held that the depositor had no cause of action against the assignee, upon the same reasoning as that which was applied in the Ayres case.

See also *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. Rep. 228; and *Burton v. United States*, 196 U.S. 283, where it was held that the right to charge back does not vary the legal effect of the deposit, but is merely a method of exacting payment from an indorser.

7. *W. J. Barton Seed Co. v. Mercantile Nat. Bank*, Tenn., 160 S. W. Rep. 848. In the opinion it was said: "The paper is subject to garnishment for the debts of the customer, to the extent of the customer's interest

In a recent decision by the Supreme Court of Kansas involving substantially the same facts the court said: "We cannot regard the right of a bank receiving a draft for deposit to charge the amount back to the depositor if payment is refused as having a determining influence," and in this case it was held, that the proceeds of the collection in the hands of the correspondent bank were not subject to garnishment by the depositor's creditor.⁸

These cases, while apparently conflicting, differed in one important particular. In the first case it did not appear that the depositor had drawn his account down below the amount of the draft, while in the second case it appeared that the depositor had drawn against and used up the entire amount credited to him at the time of the deposit. From the two decisions may be deduced the rule that the proceeds in the hands of a correspondent are subject to garnishment by a creditor of the depositor, where the bank is entitled to charge back in case of non-collection, unless it appears that the depositor has drawn against the credit, in which event the rights of the initial bank are superior to those of the creditor.

Where there is an agreement between the bank and the depositor permitting the bank to charge back uncollected checks, the bank is not liable to the depositor in a case where a correspondent bank to which the check is sent for collection, fails while the proceeds are in its hands.⁹

§217. Insolvency of Bank in which Check is Deposited.—When a bank, in which a check is deposited by the holder, with an unrestricted indorsement, becomes insolvent, before the proceeds of collection are paid over to the owner of the check various questions are presented as to the rights of the parties in the check or its proceeds. A controversy may arise between the de-

at the time the garnishment notice is served. His interest is measured by the extent to which he has drawn on the deposit based on faith of the paper. If at any time there is to his credit on the books of the bank a sum less than that of the deposit, his beneficial interest in the paper is, to that extent, decreased. If at the date of the garnishment he has wholly drawn the amount to his credit, he has no beneficial interest in the paper or its proceeds, and the garnishing creditor of the customer obtains nothing."

8. *Scott v. W. H. McIntyre Co.*, Kan., 144 Pac. Rep. 1002.

9. *Fanset v. Garden City State Bank*, S. D., 123 N. W. Rep., 686. See, also, §207.

positor and the receiver of the bank, in which the receiver contends that the depositor is a mere general creditor for the amount of the check, while the depositor claims that the bank acted as agent for collection and that he is entitled to the check if it is in the receiver's possession, or to its proceeds as a trust fund in the event that the check has been collected. A claim may be interposed by a third party, as where a correspondent bank to which the check has been forwarded claims the rights of a holder in due course or contends that it should be permitted to apply the proceeds of the collection to the satisfaction of a debt owing to it by the insolvent bank. In general the determination of rights of various parties depends upon whether the title to the check has passed from the depositor to the bank in which it was deposited. And this, in turn, depends upon the circumstances under which the deposit was made.

§218. Whether the Depositor is a Preferred or General Creditor.—As a general rule there is no explicit understanding between a depositor and his bank, at the time of depositing a check, as to whether title to the check passes to the bank or remains with the depositor, and if the check is indorsed generally and not "for collection" the question as to the passing of title depends upon the circumstances surrounding the transaction. It is sometimes understood between the parties that the bank shall have the right to charge back the amount of the check in case of its non-collection and such an agreement is a determining factor in ascertaining the rights of the parties. Where there is such an agreement it is held that an restricted indorsement does not pass title to the check. In a case of this kind it appeared that the plaintiff company deposited in a bank a check indorsed by it in blank. The amount was credited to the depositor and it could draw against the credit, but it was understood that if the check was not paid on presentation, the amount could be charged back to the depositor. The bank failed before the check was collected. It was held that the facts recited stamped the transaction as a bailment for collection and not as a sale of the check to the bank, and that, therefore, the plaintiff was entitled to the possession of the check as against the receiver.¹⁰

10. *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. Rep. 365. In the opinion it was said: "It seems now settled by the weight of author-

The fact that the depositor is not entitled to draw against a deposit of checks until they have been collected is also an indication that the parties intended that title to the checks should remain in the depositor.¹¹ Thus, where checks indorsed in blank were credited to the depositor, the depositor having no right to draw against the credit until the collection was made, and it being understood that the bank might charge back uncollected checks, and the bank failed before being notified by its correspondent that the checks had been collected, it was held that the depositor was entitled to recover the proceeds from the receiver as a trust fund.¹²

ity, especially the more recent cases, and it is in accordance with 'the reason of things,' that while an indorsement 'for collection' of a draft or check does not transfer title to the indorsee, but merely constitutes him the agent of the indorser, a different result does not follow an unrestricted indorsement, where, though the indorser is credited and the indorsee charged with the amount of such paper, it appears as a fact that the indorsee does not become unconditionally responsible for such amount until the check or draft is actually paid."

11. *Goshorn v. Murray*, 197 Fed. Rep. 407; *Miller v. Norton*, 114 Va. 609, 77 S. E. Rep. 452. See also *Armstrong v. National Bank of Boyertown*, 90 Ky. 431, 14 S. W. Rep. 411.

12. *Goshorn v. Murray*, 197 Fed. Rep. 407. The following rule was stated by the court: "We have carefully examined all the cases presented to us by the respective counsel, and concluded that the weight of authority establishes this as the true rule: That, in the absence of a special contract, the property in checks or drafts on depositories other than one in which the deposit is made by the owner of the checks and drafts remains in such owner until collection is made, credit entered and notice given of such credit to the depository receiving such checks or drafts from the owner. Under this rule, it becomes a question of fact rather than of law for the court."

In *Miller v. Norton*, 114 Va. 609, 77 S. E. Rep. 452, the plaintiff deposited in his bank a check indorsed generally which was credited to his account. It was understood that the bank might charge back the amount of uncollected checks and it did not appear that the depositor had any authority to draw against items deposited until they were collected. The check in question was forwarded and reached the drawee on the day after a receiver had been appointed for the initial bank. The proceeds of the collection afterwards came to the receiver's hands. It was held that title to the check had not passed to the bank in which it was deposited and that the depositor was entitled to recover the proceeds of the collection from the receiver.

In *Gonyer v. Williams*, Cal., 143 Pac. Rep. 736, it was held that the indorsement in blank and deposit of a check in the ordinary course of business, no reference being made in the decision as to the right of the

Where, however, it appears that the depositor is entitled to draw against the check which he deposits, it is held that the check is not deposited for collection but as cash for immediate use and that the depositor has no standing other than that of a general creditor upon the insolvency of the bank even though such insolvency occurs before the check is collected.¹³

But the fact that the depositor has the right to draw before collection is not conclusive on the question whether title to the check passes to the bank; if it further appears that it is understood that the amount of the check is to be charged back in case of nonpayment, the transaction is merely a bailment for collection and the depositor is entitled to recover possession of the check from the receiver where the bank fails before the collection is made.¹⁴

The decisions, thus far referred to in this section present a situation, wherein the bank in which the check was deposited closed its doors prior to the collection of the check. Where the failure does not occur until after the check has been collected and the proceeds are in the hands of the bank, the circumstances attending the deposit, such as the right of the depositor to draw before collection and the right of the bank to charge back if not collected, become immaterial. Upon receiving the proceeds of the collection and mingling with its general funds, the bank becomes the debtor of the depositor, though prior to that time it might have been a mere agent for collection, and the depositor can enforce no preference, but is limited to the rights of a general creditor.¹⁵

In a recent California case, a bank, to which a check was sent for collection, collected the amount and, after deducting its usual charge, sent its draft to the owner of the check. The bank, however, suspended business before its draft was presented and

depositor to draw before collection, or the right of the bank to charge back if uncollected, passed title to the bank at the time of the deposit and that the depositor was entitled to claim only as a general creditor upon the failure of the bank.

13. *Williams v. Cox*, 97 Tenn. 555, 37 S. W. Rep. 282.

14. *Armour Packing Co. v. Davis*, 118 N. C. 548, 24 S. E. Rep. 365.

15. *Gonyer v. Williams*, Cal., 143 Pac. Rep. 736; *Young v. Teutonia Bank & Trust Co., La.*, 64 So. Rep. 984; *Commercial & Farmers Nat. Bank v. Davis*, 115 N. C. 226, 20 S. E. Rep. 370; *First Nat. Bank v. Davis*, 114 N. C. 343, 19 S. E. Rep. 280.

the draft, therefore, was not paid. It was held that while the bank was clearly an agent for collection in the first instance, the relation was changed to that of debtor and creditor upon the completion of the collection.¹⁶

The cases involving the rights of a depositor upon the failure of the bank, where the check is indorsed "for collection," have been considered in another section.¹⁷

§219. Rights of Correspondent Bank on Failure of Initial Bank.—When the initial bank in a collection transaction forwards checks deposited with it to a correspondent bank, the latter is entitled to assume that title to the checks is vested in the initial bank, unless it has notice to the contrary or is put upon inquiry. If a check is indorsed by the depositor "for collection" the correspondent bank is thereby put upon notice that the depositor intends to retain title to the check. If, on the other hand, the check bears a blank or other unrestricted indorsement, the correspondent bank is entitled to deal with it as though it belonged to the initial bank. The correspondent bank may, by parting with value, become a holder of the check in due course and as such be entitled to maintain an action on the check against the drawer.¹⁸ Thus, where the defendant company drew a check to its own order, indorsed it without restriction, and deposited it in a bank which was insolvent at the time, a correspondent bank, to which the check was forwarded for collection, having paid out the amount of the check on drafts of the insolvent bank before notice of the insolvency was held entitled to recover in an action against the drawer.¹⁹

The correspondent bank, receiving a check from the initial bank indorsed without restriction, without notice that the depositor claims any interest in the check, may, upon the insolvency of the initial bank, apply the proceeds of the check to

16. *Gonyer v. Williams*, Cal., 143 Pac. Rep. 736.

17. See, *supra*, §214.

18. *United States Nat. Bank, v. Amalgamated Sugar Co.*, 179 Fed. Rep. 718; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530. See also *Murchison Nat. Bank v. Dunn Oil Mills Co.*, 150 N. C. 718, 64 S. E. Rep. 885.

19. *United States Nat. Bank v. Amalgamated Sugar Co.*, 179 Fed. Rep. 718.

the satisfaction of an obligation owing to it from the initial bank.²⁰

In a case where the action was by the payee of a check against the correspondent bank it appeared that the payee had indorsed the check in blank and deposited it in his bank. On the same day that bank transferred the check to the defendant bank to which it was indebted and the check was applied to the reduction of the indebtedness. On the following day, the bank in which the check was deposited failed. It was held that the defendant obtained good title to the check, and, not having any knowledge of the insolvency of the initial bank, was entitled to the check and was not liable in any way to the plaintiff.²¹

Depositors of checks can protect themselves from consequences of this kind by indorsing their checks "for collection." By so indorsing, notice is given to subsequent takers that title to the check remains in the indorser.²²

Where the correspondent bank does not collect the check or give credit for the amount on its books to the initial bank prior to the failure of the initial bank, it does not acquire title to the check and, therefore, has not the right to apply the proceeds against an obligation owing to it by the initial bank.²³ In a New Jersey case it appeared that the plaintiff drew a draft to the order of the initial bank and deposited it in that bank for collection. That bank sent it to the defendant bank by which it was subsequently collected. The defendant bank did not

20. *American Exchange Nat. Bank v. Theummler*, 195 Ill. 90, 62 N.E. Rep. 932; *Doppelt v. National Bank of Republic*, 175 Ill. 432, 51 N.E. Rep. 753; *Garrison v. Union Trust Co.*, 139 Mich. 382, 102 N.W. Rep. 978.

21. *Hoffman v. First Nat. Bank*, 46 N.J. Law 604.

22. *United States Nat. Bank v. Amalgamated Sugar Co.*, 179 Fed. Rep. 718. In *Hoffman v. First National Bank*, 46 N.J. Law 604 it was said: "The words 'for collection' appended to an indorsement limit the effect which the indorsement would have without them, and warn subsequent takers that the purpose of the indorsement, though in blank, is not to transfer the ownership of the paper or its proceeds. Such an indorsement, is intended, not to give currency and circulation to the paper, but to have an effect precisely the reverse, *i.e.*, to prevent further circulation, and to limit the authority of the holder to the act of collection, for the benefit of the indorser."

See also, *supra*, §214.

23. *Josiah Morris & Co. v. Alabama Carbon Co.*, 139 Ala. 620, 36 So. Rep. 764; *Nash v. Second Nat. Bank*, 67 N.J. Law 265, 51 Atl. Rep. 727.

credit the draft to the account of the initial bank until after the draft was collected and at that time the initial bank had closed its doors. It was held that the plaintiff was entitled to the proceeds as against the defendant bank, which claimed its right to apply the proceeds on the account current between the two banks, which showed a balance in favor of the defendant.²⁴

§220. Insolvency of Correspondent Bank.—When a bank, in which a check is deposited, forwards it to a correspondent bank and that bank fails while the proceeds are in its hands, the question arises as to the liability of the initial bank to its depositor. The question presented is whether a bank, undertaking the collection of a check, is responsible to its depositor for the defaults of its correspondent. Upon this matter the authorities are in hopeless conflict, it being held in some jurisdictions that the bank is liable unconditionally and in other jurisdictions that the bank is liable only where it has failed to exercise due care in the selection of proper correspondents. The authorities on this point have been fully considered in other sections.²⁵

In a case, where it was expressly understood between the depositor and the bank that the bank should have the right to charge back the check in the event of its noncollection, and no charge was made by the bank for its services in collecting the check, it was held that the bank was not liable to its depositor where a correspondent to which the check had been sent failed while the proceeds were in its hands.²⁶

24. *Nash v. Second Nat. Bank*, 67 N. J. Law 265, 51 Atl. Rep. 727. In the opinion it was said that if the defendant bank, at the time of receiving the draft, had accepted it as its own by applying it to the subsisting indebtedness of the initial bank its title would have been good as against the plaintiff.

In *Branch v. United States Nat. Bank*, 50 Neb. 470, the plaintiff indorsed in blank a check payable to his order and delivered it to the C bank for collection. The C bank indorsed it "collect for account of C bank" and forwarded it to the defendant bank by which it was collected and credited against an overdraft of the C bank. The following morning the C bank was placed in the hands of a bank examiner. It was held that while the blank indorsement by the plaintiff invested the C bank as apparent owner, the indorsement for collection by the C bank gave the defendant only such title as would enable it to demand payment and did not authorize it to apply the proceeds on its claim against the C bank.

25. See, *supra*, §203-207.

26. *Fanset v. Garden City State Bank*, S. D., 123 N. W. Rep. 686. See also, *supra*, §207.

§221. Deposit when Officers Aware of Bank's Insolvency.—

There are cases in which it appears that a customer of a bank deposits checks to his credit, or a bank, being the owner of checks, forwards them to another bank for collection, at a time when the officers of the bank receiving the deposit are aware of the fact that the bank is hopelessly insolvent. Upon the failure of the bank of deposit, the question arises as to whether the owner of the checks is entitled to recover the amount in full, or whether he must come in as a general creditor and share in the assets of the bank. This depends upon whether or not title to the checks passed to the bank of deposit. In cases of this kind, the form of the indorsement, the manner in which the checks are credited and the understanding between the parties as to drawing against the deposit and charging back the checks in case of non-collection have little or nothing to do with the passing of title. The rule which is here applied is that the receipt of a deposit by a bank, at a time when it is insolvent within the knowledge of its officers, is a fraud upon the depositor. The fraud consists in keeping the bank open for the transaction of business after its officers know that it is insolvent and in concealing the fact of the insolvency from the depositor. Under such circumstances, the ownership of the deposit remains in the depositor; the bank becomes a trustee and holds the deposit as a trust fund for the benefit of the depositor; the depositor is entitled to rescind the transaction and recover the checks if they have not been collected and are still in the possession of the bank, or, if they have been collected, to recover the proceeds, provided he can trace and identify such proceeds in accordance with the principles of law referred to in this section.²⁷

When it appears that the bank became insolvent before the collection of the checks in question and no innocent third parties have secured any lien or other interest in the checks, the right of the depositor to reclaim the identical checks de-

27. *St. Louis Etc. Ry. Co. v. Johnston*, 133 U. S. 566; *Wasson v. Hawkins*, 59 Fed. Rep. 233; *Richardson v. Denegre*, 93 Fed. Rep. 572; *Hutchinson v. National Bank of Commerce*, 145 Ala. 196, 41 So. Rep. 143; *American Trust & Savings Bank v. Gueder Mfg. Co.*, 150 Ill. 336, 37 N. E. Rep. 227; *Kansas State Bank v. First State Bank*, 62 Kan. 788, 64 Pac. Rep. 634; *Cragie v. Hadley*, 99 N. Y. 131; *Knaffl v. Knoxville Banking & Trust Co.*, Tenn., 170 S. W. Rep. 476.

posited is clear.²⁸ The case presented is like that of a trader who, knowing that he is insolvent, but whose credit is good, goes into the market and makes a purchase with knowledge that he will not be able to pay for it. In such case he commits an intentional fraud upon the seller and the seller, upon finding it out, may rescind the contract of sale and recover the very goods if he can find them and they have not been passed into the hands of an innocent third party.²⁹

But when the checks have been collected and the proceeds have come into the hands of the bank before it closes its doors, the depositor occupies a less secure position. In some of the decisions it is held that the depositor's right to a preference ceases as soon as the proceeds of his check have been received by the insolvent bank and mingled with its other funds so that it is no longer possible to trace and identify the particular money which constituted the proceeds of the collection.³⁰ And it has been held that where a bank, the officers of which were aware of its insolvency, forwards to a correspondent for collection a check which it had credited to the depositor as cash, and the correspondent bank credits the check to the insolvent bank before its failure, the depositor is entitled to no preference over the other creditors of the insolvent bank, but must come in and share with them in the banks' assets.³¹

Upon the effect of mingling the proceeds of a collection with the general funds of the insolvent bank, the Supreme Court of Minnesota has said: "Where a bank remains open, holding itself out as ready to transact business, this is an implied representation of solvency, and for it to receive a deposit when its insolvency is known to its officers is a fraud upon the depositor. The depositor may, therefore, at his election, rescind the contract of deposit and recover back the money, or property, *but*

28. *St. Louis Etc. Ry. Co. v. Johnston*, 133 U. S. 566; *Richardson v. Denegre*, 93 Fed. Rep. 572; *American Trust & Savings Bank v. Gueder Mfg. Co.*, 150 Ill. 336, 37 N. E. Rep. 227.

29. *Perth Amboy Gas Light Co. v. Middlesex Co. Bank*, 60 N. J. Eq. 84, 45 Atl. Rep. 704.

30. *Bayor v. American Trust & Savings Bank*, 157 Ill. 62, 41 N. E. Rep. 622; *Lanterman v. Travous*, 174 Ill. 459, 51 N. E. Rep. 805; *Higgins v. Hayden*, 53 Neb. 61; *Commercial & Farmers' Nat. Bank v. Davis*, 115 N. C. 226, 20 S. E. Rep. 370; *Bruner v. First Nat. Bank*, 97 Tenn. 540, 37 S. W. Rep. 286.

31. *Bruner v. First Nat. Bank*, 97 Tenn. 540, 37 S. W. Rep. 286.

he must do so before the deposit has become commingled with the general assets of the bank."³²

These cases, however, do not represent the present weight of authority, though they are indicative of the earlier rule on this question. The former rule has been extended and it is now held by most of the authorities that, where a bank receives a check for collection at a time when it is known to its officers that it is insolvent, the depositor is entitled to regard the proceeds of the collection as a trust fund and to recover the entire amount from the receiver upon the failure of the bank, notwithstanding the fact that such proceeds have become mingled with the other assets of the bank in such manner as to prevent their identification, provided it appears that the money collected was not paid out by the bank prior to its failure and that the fund in the receiver's hands has been increased by the collection.³³

The development of the rule permitting the depositor to trace the proceeds of his check into the hands of the receiver of a collecting bank is brought out in the following statement: "Formerly the equitable right of following misapplied money or other property into the hands of the party receiving it, depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however,

32. *Higgins v. Hayden*, 53 Neb. 61.

In *Bayer v. American Trust & Savings Bank*, 157 Ill. 62, 41 N. E. Rep. 622, it was said: "It has frequently been announced as the law of this State, that even in a case where a definite and actual trust fund, which possesses all the attributes of a separate and distinct identity has been so mixed and mingled with other funds as to render identification impossible, the *cestui que trust*, in the event of insolvency of the trustee, is limited to the position and the rights of a general creditor."

33. *Wasson v. Hawkins*, 59 Fed. Rep. 233; *Western German Bank v. Norvell*, 134 Fed. Rep. 724; *Kansas State Bank v. First State Bank*, 62 Kan. 788, 64 Pac. Rep. 634; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 49 S. W. Rep. 994; *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84, 45 Atl. Rep. 704; *Willoughby v. Weinberger*, 15 Okla. 226, 79 Pac. Rep. 777; *Pennington v. Third Nat. Bank*, Va., 77 S. E. 455.

it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried."³⁴

The Supreme Court of Missouri has expressed the modern rule in the following words: "Equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified and this court has extended this doctrine, and held that when a trustee or bailee wrongfully mixed trust money with his own, so that it cannot be distinguished as to what portion is trust money and what part private funds, equity will follow the money by taking out of the estate of the trustee or bailee or his insolvent estate, the amount due the *cestui que trust*."³⁵

The fact that the insolvency of a bank is known only to an officer or officers whose defalcations are responsible for the bank's financial condition has been held to have no bearing upon the right of the depositor of a check to recover the proceeds of the collection from the receiver. In a Virginia decision it appeared that the plaintiff, a bank in Columbus, Georgia, being the holder, for value, of a draft, sent it to a bank in Tarboro, N. C., with instructions "for collection and return." The Tarboro bank collected the draft in the form of a check on a bank in Norfolk, Va., which it sent to the Norfolk bank for deposit to its account. The Tarboro bank was insolvent at the time it received the plaintiff's draft but this fact was known only to the cashier whose defalcations were responsible for the bank's insolvency. After the Tarboro bank closed its doors, the fund in the hands of the Norfolk bank was claimed by the plaintiff and by the receiver of the Tarboro bank. It was held that, under these circumstances, the plaintiff was entitled to

34. *Frelinghuysen v. Nugent*, 36 Fed. Rep. 229.

35. *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 49 S. W. Rep. 994.

"The authorities are agreed that when a bank, with knowledge of its insolvency, receives a deposit, it perpetrates a fraud on the customer, and is held to be a constructive trustee of the deposit, and the depositor may recover of the receiver the deposit, if it can be identified, or its equivalent, if it cannot be identified, when the customers' money has been mingled with the bank's funds, which, to an amount equal to the deposit, has gone into the hands of its receiver." *Pennington v. Third Nat. Bank, Va.*, 77 S. E. Rep. 455.

the fund. The fact that the insolvency was known only to the officers who were responsible for the insolvent condition did not affect the general rule.³⁶

The doctrine that one who deposits a check in a bank when it is insolvent to the knowledge of its officers is entitled to recover the amount of his check from the receiver, upon the insolvency of the bank, although the proceeds have become mingled with the general assets of the bank, is subject to the limitation that it must appear that the assets in the hands of the receiver were increased by the amount received for the check; otherwise the depositor is not entitled to claim the proceeds of his check as a trust fund, but is limited to the rights of a mere general creditor.

If a bank uses the check in question in settlement of a debt owing by it, the transaction results in no increase of the fund in the receiver's hands and the depositor has only the rights of a general creditor. In one case, the plaintiff bank sent a draft to the C bank to be deposited to the plaintiff's credit. The C bank, which was then insolvent, sent the draft to the N bank to be deposited to the credit of the C bank and the N bank applied the proceeds to a debt due it from the C bank. Upon the failure of the C bank, it was held that the plaintiff was not entitled to the payment of the amount of the draft as a preferred claim, the reason being that the assets of the bank for distribution among the creditors had not been increased by the deposit of the draft.³⁷

There is likewise no increase in the assets coming to the hands of the receiver of an insolvent bank when the item in question is drawn on the bank or upon one of its creditors, and is paid by crediting the amount to the depositor and charging it against the account of the party liable on it. Such a transaction is nothing more than the transfer of a liability from one of the bank's creditors to another creditor and does not make any addition to the assets of the bank.³⁸

The same result is brought about where the check deposited

36. *Pennington v. Third Nat. Bank, Va.*, 77 S. E. Rep. 455.

37. *City Bank of Hopkinsville v. Blackmore*, 75 Fed. Rep. 771.

38. *Beard v. Independent District*, 88 Fed. Rep. 375; *Midland National Bank v. Brightwell*, 148 Mo. 358, 49 S. W. Rep. 994; *Willoughby v. Weinberger*, 15 Okla. 226, 79 Pac. Rep. 777; *Freiberg v. Stoddard*, 161 Pa. 259, 28 At. Rep. 1111.

is sent to the clearing house and there used in settling the balance due the clearing house and in paying checks drawn upon the bank by its customers.³⁹ In an Oklahoma case, plaintiff deposited checks in the Capital National Bank, which were used by the bank in settling its account at the clearing house, the Capital bank being insolvent at the time within the knowledge of its officers. It was held that the plaintiff was entitled to no preference over the other creditors upon the failure of the bank. The use of the checks at the clearing house simply transferred that amount of the bank's indebtedness from the clearing house to the plaintiff, and at the time the bank closed its doors, it had on hand no money or property representing the plaintiff's checks.⁴⁰ In an Illinois case the insolvent bank took the check in question to the drawee with other checks on the same drawee, and an adjustment was had in the nature of a clearing house transaction, there being a balance in favor of the insolvent bank. It was held that the plaintiff was here entitled to no preference.⁴¹

§222. Liability of Bank Collecting Forged or Altered Checks.—

The liability of a bank which has collected and paid over the proceeds of a check bearing a forged signature or indorsement, or a check which has been fraudulently altered, has already been discussed.⁴²

There is a line of decisions particularly favorable to a bank collecting a forged or altered check and paying over the proceeds in good faith to the one for whom it acted as agent in the transaction, where the drawee bank had notice that the

39. *Lanterman v. Travous*, 174 Ill. 459, 51 N. E. Rep. 805; *In re Seven Corners Bank*, 58 Minn. 5, 59 N. W. Rep. 633; *Willoughby v. Weinberger*, 15 Okla. 226, 79 Pac. Rep. 777. *Contra*, *Kansas State Bank v. First State Bank*, 62 Kan. 788, 64 Pac. Rep. 634. In the last cited case it was held that the use of money collected for the payment of the indebtedness of the trustee is not to be regarded as an enlargement and betterment of the trustee's estate; but it was further held that the collection of such check by an exchange of checks with other banks, and settlement of the balance at the close of the day, instead of collecting the check separately from the drawee, is not to be regarded as a payment of indebtedness to the bank to which it was given in exchange.

40. *Willoughby v. Weinberger*, 15 Okla. 226, 79 Pac. Rep. 777.

41. *Lanterman v. Travous*, 174 Ill. 459, 51 N. E. Rep. 805.

42. See Chapter X, Altered Checks and Chapter XI, Forged Checks.

collecting bank was not the owner of the check but held and collected it merely as agent for another. These decisions laid down the rule that where a check was indorsed "for collection" to a bank, and the proceeds paid over to the owner of the check, the bank's indorsement, did not warrant to the drawee the genuineness of the check. The indorsement of the collecting bank was deemed by these cases to warrant merely the relation of principal and agent existing between the owner of the check and the collecting bank. Consequently, if it were discovered, after the collecting bank had paid over the proceeds, that the check bore a forged indorsement or had been fraudulently raised, or was otherwise irregular, the collecting bank was not liable to the drawee even though it had indorsed the check in blank.⁴³

These decisions, however, are no longer the law in those states which have adopted the Negotiable Instruments Law. That statute now provides, that every indorser who indorses without qualification, warrants to all subsequent holders in due course, certain matters, including the genuineness of the instrument. No reservation is made in favor of banks holding checks under indorsements for collection.⁴⁴

43. *United States v. American Exchange Nat. Bank*, 70 Fed. Rep. 232; *Wells-Fargo & Co. v. United States*, 45 Fed. Rep. 337; *United States Nat. Bank v. National Park Bank*, 59 Hun (N. Y.) 495, Aff'd. 129 N. Y. 647; *National City Bank v. Westcott*, 118 N. Y. 468; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28.

44. *Neg. Inst. Law*, §116 of the New York Act.

CHAPTER XVI.

CLEARING HOUSES.

- §223. Definition of Clearing House.
- §224. Collection of Check Through Clearing House.
- §225. Collection of Substituted Check Through Clearing House.
- §226. Return of Checks Under Clearing House Rule.
- §227. Return of Overdraft Check After Time Specified in Rule.
- §228. Return of Overdraft Check After Time Specified in Rule Allowed in New York and Massachusetts.
- §229. Effect of Clearing House Rules.

§223. Definition of Clearing House.—A clearing house may be described as a place where the representatives of various member banks meet and, under the supervision of a competent committee or officer selected by them, make or receive payment of balances and so “clear” the transactions of the day upon which the settlement is made.¹

1. A New York court has described the clearing house in the following terms: “ That association appears by its constitution to have adopted a very simple manner of settling the drafts, checks, and other claims of its various members against the others. Each member, every morning, delivers to the clearing house the checks, drafts, and notes it holds against the other banks and receives credit therefor, while it is charged with all checks, drafts, or notes payable by it and deposited by other banks. If its deposits exceed the drafts and checks deposited against it, it receives from the clearing house during the day the amount of the excess in money, while, if the reverse proves the case, it is obliged to pay the balance against it to the clearing house. In this daily settlement of the clearing house no account is taken of the fact that the checks may be bad. All checks, drafts or notes on any bank are charged against it, though the accounts of the drawers of those checks or the makers of the notes may not be good for their amounts, and even though the checks be forgeries. By section 14 of the constitution it is provided that the association shall be no way responsible for such items, but that they are to be adjusted directly between the bank that deposited them in the clearing

In his work on Clearing Houses, Mr. James G. Cannon gives this description and classification of clearing-houses in the United States: "Though originally designed as a labor-saving device, the clearing-house has expanded far beyond those limits, until it has become a medium for united action among the banks in ways that did not exist even in the imagination of those who were instrumental in its inception. A clearing-house, therefore, may be defined as a device to simplify and facilitate the daily exchanges of items and settlements of balances among the banks, and a medium for united action upon all questions affecting their mutual welfare.

"The clearing-houses in the United States may be divided into two classes, the sole function of the first of which consists in clearing notes, drafts, checks, bills of exchange, and whatever else may be agreed upon; and the second of which, in addition to exercising the functions of the class just mentioned, prescribes rules and regulations for the control of its members in various matters, such as the fixing of uniform rates of exchange, interest, charges, collections, etc.

"Clearing-houses may also be divided into two classes with reference to the funds used in the settlement of balances: First, those clearing-houses which make their settlements entirely on a cash basis, or * * * by such form of acknowledgment or certificate as the associated banks may agree to use in their dealings with each other as the equivalent or representative of cash; and second, those clearing-houses which make their settlements by checks or drafts on large financial centres."²

§224. Collection of Check Through Clearing House.—The collection of a check through a clearing house usually requires

house and the bank on which they were drawn. Section 15 provides that 'All checks, drafts, notes or other items in the exchanges returned as not good or missent, shall be returned the same day directly to the bank from whom they were received, and the said bank shall immediately refund to the bank returning the same the amount which it had received through the clearing house for the said checks, drafts, notes, or other items so returned to it in specie or legal tender notes.' It will be seen that the system of clearances adopted by the association is very simple, and that it enables exchanges of the greatest magnitude to be effected in a remarkably brief period of time." *Mt. Morris Bank v. Twenty-third Ward Bank*, 172 N. Y. 244, 64 N. E. Rep. 810.

2. Clearing Houses, page 1, 2.

more time than would be needed if the check were presented directly to the bank on which it is drawn. And since a short delay in the presentment of a check may result in its noncollection, because of the insolvency of the drawee bank, or some other circumstance, the question is sometimes presented as to whether a bank receiving a check for collection does not subject itself to liability in making use of the clearing house for the purpose of accomplishing the collection. When the question presented is whether the presentment of the check through a clearing house is sufficient to charge the drawer, we find a conflict among the authorities. This matter has been discussed in another section.³

When the dispute arises between the bank, which receives a check for collection, and the person from whom it was received, it is held that the bank acts with due diligence in making the presentment through the clearing house, at least in the case where the owner of the check is aware that such is the common practice among banks, for one who deposits a check in a bank for collection is bound by any reasonable usage, of the existence of which he is informed.⁴

In *Merchants' Nat. Bank v. Dorchester*, it appeared that the plaintiff received a check on October 16th at 8 A.M., which he deposited the same day, for his own convenience, in a bank for collection. The check was deposited too late to be sent to the clearing house on that day and the plaintiff was aware of a custom among banks to collect checks through the clearing-house. The check went through the clearing house on the 17th, and was presented to the drawee after three o'clock on that day. Payment was refused because of the failure of the drawee, but it appeared that the check would have been paid if presented before three o'clock. It was held that the bank in which the check was deposited was not negligent in presenting the check for payment through the clearing house instead of directly to the drawee bank and, having done so with the plaintiff's implied consent, it was not liable to him for the amount of the check. It was held, however, that presentment in this manner released the drawer from liability on the check, it appearing that he had no knowledge as to the custom of collecting checks through

3. See, *supra*, §75.

4. *Merchants' Nat. Bank, v. Dorchester*, Tex. Civ. App., 136 S. W. Rep. 551.

the clearing house.⁵ In the absence of a usage, such as was shown in this case, it would doubtless have been negligence on the part of the bank to have delayed making direct presentment to the drawee bank until after business hours on the 17th, but the parties, in view of the knowledge of the usage possessed by both, impliedly contracted that presentment at the clearing house should be sufficient.

§225. Collection of Substituted Check Through Clearing House.—There is a general rule to the effect that a bank receiving a check for collection must collect it in money and is not permitted to receive in payment the drawee's draft or check on another bank.⁶

Notwithstanding the strictness with which this rule is enforced, it is not at all uncommon for a collecting bank, upon presenting an item which it holds for collection to the drawee, to receive in payment the latter's check on another bank, instead of insisting upon payment in cash. For want of a better designation the check so received in payment may be referred to as a substituted check. In taking a substituted check, the collecting bank generally assumes the risk of its payment and renders itself responsible for any resulting loss. There are, however, cases which intimate that, notwithstanding the dishonor of the substituted check, the collecting bank is protected in making collection in this manner if it uses the utmost diligence in presenting the substituted check.⁷

5. *Merchants' Nat. Bank v. Dorchester, Tex. Civ. App.*, 136 S. W. Rep. 551. The court said: "Negligence cannot be imputed to the bank if it acted in relation to the check as it was contemplated between the parties that it would act at the time the check was deposited. In other words, Dorchester, knowing that the course the check would take would be through the clearing house, and knowing the hour of the meetings of the clearing house, and knowing that, if the check was not deposited with the bank on October 16th in time for it to reach the clearing house that day, it would be held over until the next day and then be passed through the clearing house, and if, as the court finds, the check was deposited by Dorchester too late on the 16th to go to the clearing house that day, he cannot now complain that the action the bank took and which he knew it would take, and which action was, under the circumstances of this case, with his implied consent and the implied agreement between them, was negligence in presenting the check at the clearing house, and in not presenting it at the office counter of the House bank."

6. See, *supra*, §209.

7. See, *supra*, §209.

"Utmost diligence" in these cases means that the collecting bank must present the substituted check immediately and is not permitted to hold it for collection through the clearing house. If it does hold it and present it through the clearing house in the usual course of business and something happens in the meantime to prevent the collection, such as the failure of the bank by which the substituted check is drawn, the collecting bank will be held responsible for the loss.

In one case, which illustrates this proposition, the plaintiff drew a sight draft upon a corporation located in Chicago and mailed it to the defendant bank in Chicago. The defendant presented the draft to the drawee by messenger and received therefor the drawee's check upon the National Bank of the Republic of Chicago. This occurred at about eleven o'clock Saturday morning. The defendant might have presented this check immediately to the National Bank of the Republic for payment or certification, and if it had done so, the check would have been paid or certified as requested by the defendant. The defendant, however, held the check and presented it through the clearing house on Monday morning. Payment was then refused because of the failure on that day of the corporation by which the check was drawn. It was held that the defendant bank was liable to the plaintiff.⁸

8. *Bank of Commerce v. Miller*, 105 Ill. App. 224. After referring to the authorities on the question presented the court said: "The conclusion to be drawn from these cases and the text books cited by counsel is, that a draft may be surrendered and a check taken therefor, but all reasonable diligence must be used in presenting such check for collection, and if such diligence be used and the check is not promptly paid or certified, then the draft may be at once reclaimed. No general custom, if such custom existed, would excuse the collecting bank from exercising all reasonable diligence in collecting such check, and certainly a special usage would have no greater effect in excusing the bank, than would a general custom. *National Bank of Commerce v. The American Exch. Bank*, 151 Mo. 320; *Minneapolis S. & D. Co. v. Metropolitan Bank*, 76 Minn. 136; *Marine Bank v. Chandler*, 27 Ill. 525; *Webster v. Granger*, 78 Ill. 230." In the opinion it was further said: "The alleged particular custom and method of the Bank of Commerce (defendant) in relation to the presentation of drafts, receipt of checks therefor and retention of same until the following day, contrary to the general custom, was a particular or special custom, and in order to be binding on appellee, under the circumstances of this case, must have been actually known to him when he sent the draft for collection."

In another instance, the plaintiff being indebted to the defendant, sent a check for the amount on Gilman Sons & Co., bankers in New York. The defendant deposited the check in a Philadelphia bank which sent it to its New York correspondent. The latter bank presented the check to the drawee and received in payment a check on another bank in New York City. This substituted check was received about noon time and could have been presented within twenty minutes after its receipt, but the correspondent bank presented it through the clearing house on the following day, and payment was refused because of the failure of the Gilman bank at 2:45 p.m., on that day. The correspondent bank then obtained possession of the original check and caused it to be protested; and the plaintiff, without knowledge of these facts, issued a second check to the defendant in payment of the original debt. Upon finding out how his first check had been handled, the plaintiff brought this action. It was held that sufficient diligence in presenting the substituted check for payment had not been used and that the plaintiff could recover.⁹

§226. Return of Checks Under Clearing House Rule.—It is customary for clearing houses to enact a rule permitting banks paying checks at the clearing house to return them to the banks from which they were received, if found not good and if returned before a certain hour on the day of payment, and requiring banks to which checks are returned in this manner to refund the amount thereof. The effect of the clearing house rule with reference to the return of checks is to permit the drawee bank to return a check not found good, if returned before a certain specified hour, and to make the clearing house payment final if the check is not returned before that hour. In general it may be said that a check may be returned by the drawee before the hour specified in the clearing house rule when found to be irregular for any reason, as for instance, because it is an overdraft, or drawn by one not a depositor, or bears a forged signature or indorsement, or has been fraudulently altered or because the drawer has stopped payment. There is some confusion as to what checks may be returned after the elapse of the time specified by the clearing house rule, but it is quite clear that

9. *Noble v. Doughton*, 72 Kan. 336, 83 Pac. Rep. 1048.

the fact that a check bearing a forged signature or indorsement, or one which has been wrongfully altered, is not returned within the time limited by the clearing house rule, does not affect the right of the drawee bank to recover the money paid on such check. The bank's rights in this regard have been discussed in another place.¹⁰

The question has been raised as to whether or not a clearing house rule allowing the return of checks found not good will permit a drawee bank to return a check because of the failure of the drawer after the payment of the check at the clearing house. In a New York decision it appeared that the drawer of a check, which had been paid at the New York clearing house at 10 a.m., made an assignment shortly thereafter and the drawee bank, acting under the clearing house rule, returned the check prior to 3 p.m., to the bank by which it had been presented, which bank refunded the amount. It was held that the transaction did not operate as a payment of the check, nor bind the drawee bank, and that the payee could not maintain an action thereon against the drawee.¹¹

10. As to the right of the drawee bank to recover money paid on an altered or forged check see Chapters X and XI.

In *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 435, it was held that a clearing house rule providing, "Errors in exchanges shall be adjusted by the banks concerned, and checks not good shall be returned to the bank depositing them before 1 p. m.," applied only to overdrafts and had no application to a forged check.

See also *Corn Exchange Nat. Bank v. National Bank of the Republic*, 78 Pa. 233.

In *National Bank of Commerce v. Mechanics' American Nat. Bank*, 148 Mo. App. 1, 127 S. W. Rep. 429, it appeared that the clearing house rule provided that all checks received at the clearing house and not returned before two o'clock on the same day should be deemed to have been paid with like effect as though they had been paid in currency. It was held that a bank which failed to return a forged check drawn upon it and received through the clearing house within the time specified could not recover the amount from the bank at which the payment was made, even though the latter bank was not injured by the delay. "If out of their experience," said the court, "these bankers making their own law, did not think it wise to make an exception to the rule to meet such an event, it is fair to assume they have concluded that it is not the part of wise and safe banking to make such an exception. As they have made none, we do not think the court should undertake to do so."

11. *Hentz v. National City Bank*, N. Y. App. Div., 144 N. Y. Supp. 979. The following is quoted from the opinion. "A payment through

In the opinion written by McLaughlin, J., he observed: "The payment of a clearing house balance is not a payment of any particular check and does not become so until the time within which the check may be returned has expired. This would seem to follow from the necessity of each case, because a bank upon which a check is drawn has no opportunity to examine it until after it has been received from the clearing house. Among the checks presented at the clearing house may be forged checks, checks drawn against insufficient funds, and checks upon which payment has been stopped, but, irrespective of their validity, all of them must, in making payment through the clearing house, be charged against the bank upon which they are drawn in order to ascertain and adjust the balance; and, if a check be thus paid, then the bank can protect itself under the rules by returning it to the bank from which it was received, within the time specified. This is precisely what the defendant did."

But, in *National Union Bank v. Earle*, a Philadelphia bank remitted an amount due to the plaintiff bank in New York by its cashier's check on another New York bank, in which it kept a deposit. The check was duly presented and paid through the clearing house. Later on the same day, the drawee bank upon learning of the suspension of the drawer, returned the check to the plaintiff, which bank was required to refund the amount under the clearing house rules. The drawee bank

the clearing house and a payment over the counters of a bank upon which a check is drawn are entirely different. The clearing house is simply a representative of all the banks who are members of it. Its purpose is to enable these banks to go to the clearing house each day and present checks drawn on other clearing house banks received the day before and receive from the clearing house checks drawn on the presenting banks which have been sent in by some other member. The clearing house then balances the checks sent by a bank against those sent to it, and later in the day a bank either pays or receives the balance due to or owing by it; in other words, it is an adjustment of balances, solely for the convenience of the banks who are members of the association. It is in no sense a payment binding upon the bank upon which it is drawn, so far as the payee named therein is concerned, since under one of the rules of the clearing house association a check or draft thus received may be returned to the bank from which it is received at any time that day before 3 o'clock in the afternoon."

See also *Columbia-Knickerbocker Trust Co. v. Miller*, 156 N. Y. App. Div. 810, 142 N. Y. Supp. 440.

subsequently, without right, paid the money over to the receiver of the insolvent bank. It was held that the payment at the clearing house constituted a complete appropriation of the fund to the plaintiff bank and that the plaintiff was entitled to recover the amount of the check from the receiver.¹²

§227. Return of Overdraft Check After Time Specified in Rule.—There is a rule quite generally supported by the authorities to the effect that a drawee bank which pays a check in a mistaken belief that it is drawn against sufficient funds is not entitled to recover the money back from the person receiving payment, upon discovering its mistake.¹³ Where such a check is presented at the counter of a bank the bank has the opportunity of examining the drawer's account and satisfying itself that the account is sufficient to pay the check. The question of the bank's right to recover the amount paid on an overdraft check is sometimes complicated by the fact that the payment is made at the clearing house. In such an event, if the bank discovers the fact that the check is an overdraft in time to return it within the time specified by the clearing house rule, it is of course, protected. But in some instances it has happened that the bank, while discovering the mistake and returning the check on the same day, does not make the return within the time limited by the rule.

In one case, at least, it has been distinctly held that where the return of an overdraft check is not made during the period of time allowed by the rule, the payment becomes final and the drawee bank is not entitled to recover the amount of the check.¹⁴

12. *National Union Bank v. Earle*, 93 Fed. Rep. 330.

13. See, *supra*, §189.

14. *Preston v. Canadian Bank of Commerce*, 23 Fed. Rep. 179. In this case it appeared that a depositor of the A bank, which was a member of the Chicago Clearing House, had left certain securities with the bank, it being agreed that he should have the right to draw checks against the securities up to ninety per cent. of their value. On the 5th day of August, 1881, the depositor made out a check for \$4,000, which was deposited with the B bank, another member of the clearing house. This check was sent to the clearing house on the morning of August 6th. Under the clearing house rules members were required to pay their balances to the clearing house by twelve o'clock, and to return checks not good to the bank from which they were received by half past one o'clock on the day of receipt. Upon receiving the check at the A bank, the cashier examined the col-

"There is no doubt of the general principle," said the Court, "that money paid under a mistake of fact may be recovered back; but it is equally true and equally a fundamental proposition of law that parties who are competent to make a contract may agree within what time they may correct mistakes, if they are made. Every one at all familiar with banking business knows that in the dispatch and haste with which large sums of money and complicated accounts are handled and business transacted during banking hours, mistakes are liable to occur; and the rapidity with which the different accounts are adjusted at the clearing house is such as to make it possible, if not probable, that mistakes will occur; and it is therefore entirely competent for parties who are dealing with each other through an agency like the Chicago Clearing House to make an agreement as to the time within which such mistakes shall be rectified. I cannot construe this rule of the Chicago Clearing House as anything else than an agreement that checks shall be returned by half-past one o'clock to the bank from which they came, when they are found not good; that is, it is a contract stipulation to that purport and effect between the members of the Clearing House. Now the question is, shall a mistake made by the bank against whom a check was drawn be allowed to abrogate the Rule?" * * * If parties competent to contract within what time they may correct mistakes in their dealings with each other have so contracted, it seems to me that the courts have no right to override or disregard such an agreement. If a mistake which

lateral on deposit, and concluded that it was sufficient to warrant the payment of the check, which was thereupon handed to the bookkeeper to be charged to the account of the depositor. At eighteen minutes of two, knowledge of the depositor's failure came to the A bank, and, upon a second examination of the collateral, it was found that mistake had been made in the first computation. The check was thereupon returned to the bank for repayment, which was refused on the ground that the presentation was not made until fifteen minutes of two. In the action, which was brought by the A bank against the B bank, the plaintiff rested its right of action on the principle that the money was paid to the defendant by reason of a mistake of fact in the first examination of the depositor's securities made by the cashier. It was claimed that the plaintiff bank would have returned the check to the defendant bank before half-past one if their cashier had not concluded from the first examination which he made that the collateral was sufficient to justify payment. The mistake which was depended upon to entitle the plaintiff to recover was that of its cashier in counting one item twice, thereby making the amount too large.

is discovered within an hour, or within 10 minutes after the expiration of the time limited by the agreement for its correction may be corrected, I can see no reason why it cannot be corrected a week afterwards or whenever it is discovered."

§228. Return of Overdraft Check After Time Specified in Rule Allowed in New York and Massachusetts.—In New York and Massachusetts there are decisions to the effect that a drawee bank which pays a check at the clearing house without knowledge that it is an overdraft, may recover the amount of such check from the bank at which the payment was made, although, because of the failure to immediately discover the mistake, the check is not returned until after the time limited by the clearing house rule. But in order to allow a recovery under the rule laid down in these cases, it must appear that the bank which received payment has not altered its position by paying over the proceeds to the owner of the check.¹⁵

In the Massachusetts decision on this point it appeared that the plaintiff bank paid to the defendant bank at the clearing house, a check drawn against insufficient funds. Under the rule of the Boston Clearing House, the check should have been returned to the defendant bank before one o'clock on the day of payment, but, owing to a mistake on the part of the messenger who was sent out with the check, it was not delivered to the defendant bank until a few minutes after one o'clock. It was held, nevertheless, that the plaintiff could recover.¹⁶ Refer-

15. *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass 281; *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513; *Citizens' Central Nat. Bank v. New Amsterdam Nat. Bank*, 128 N. Y. App. Div., 554, 112 N. Y. Supp. 973.

Where a drawee bank knows at the time a check is received from the clearing house that the drawer's account is not sufficient to meet the check, but holds the check until after time specified for return by the clearing house rules, in the expectation that the drawer will make his account good, and the drawer fails to make the account good, the drawee may not return the check. In such case there is no mistake of fact and the payment becomes final upon the expiration of the period allowed for the return of checks under the clearing house rule. *Atlas Nat. Bank v. National Exch. Bank*, 176 Mass. 300, 57 N. E. Rep. 605.

16. *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281.

Referring to the case of *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281, the United States District Court said: "The Massachusetts court puts its decision on the ground that you may correct

ring to the clearing house rule the court said: "Under this arrangement the payment required of the clearing house to a creditor bank, upon a check presented, must be regarded as only provisional until the hour of one o'clock, to become complete only in case the check is not returned at that time. And if by any mistake of fact the return of the check is not so made, then, as between the two banks, it is to be treated as a payment made under a mistake of fact, precisely to the same extent, and with the same right to reclaim, which would have existed if the payment had been made by the simple act of passing the money across the counter directly to the payee on the presentation of the check. The manifest purpose of the provision is to fix a time at which the creditor bank may be authorized to treat the check as paid and be able to regulate with safety its relation to the other parties. * * * We cannot adopt the theory that a failure to present a bad check, before the time named, to the bank sending it through the clearing house works an absolute forfeiture and is in itself a perfect bar to any action to recover the amount of such check."

a mistake of this kind at any time after it is discovered, if it places the party to whom the check is returned in no worse condition than it would have been if it had been returned within the stipulated time; thus overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time." *Preston v. Canadian Bank*, 23 Fed. Rep. 179. A reply to this is found in the later Massachusetts decision of *Merchants' National Bank v. National Bank*, 139 Mass. 513, where Devens, J., uses the words: "But we have not overlooked the right of parties to make such agreement as they choose. The question is as to the interpretation of the rule which they, as members of the clearing house, have adopted. The rule is: 'Whenever checks which are not good are sent through the clearing house, they shall be returned by the banks receiving the same to the banks from which they were received as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock.' If it were intended that mistakes should never be corrected unless discovered by one o'clock, this should in terms explicitly appear. As it does not, it seems to us the more correct interpretation to hold that the rule authorizes the bank receiving the check, after one o'clock arrives and the check is not returned, to treat it in all transactions as if it were good. If, therefore, the bank changes its position it will suffer no loss by reason of it. On the other hand, if the mistake is discovered after one o'clock, and the bank receiving the check has not changed its position by reason of the expiration of the time, it should rectify the mistake when reasonable care has been exercised by the bank on which it was drawn."

§229. Effect of Clearing House Rules.—The banks which comprise a clearing association may enact such rules for the regulation of clearing house transactions as they deem proper. While these rules are binding upon the members of the association they are not, as a general rule, permitted to have any effect upon the rights of outsiders, such as depositors and other customers of the banks. Clearing house rules are not binding on such parties, nor have they the right to claim any benefit under them, unless they contract with reference to the rules.¹⁷ In those cases in which a member bank enters into an agreement with a nonmember bank to clear for it, and the agreement is made with reference to the clearing-house rules, such rules are to be given effect in determining the rights of the parties.

In a case where a member of the New York Clearing-house agreed to clear for a bank, which was not a member of the association, the latter depositing collateral security with the member bank to protect the member bank in such payments as it might make under the agreement, it appeared that a rule of the clearing-house provided that such agreements should not

17. *People v. St. Nicholas Bank*, 77 Hun (N. Y.) 159, 28 N. Y. Supp. 407; *National Exch. Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. Rep. 1026; *National Union Bank v. Earle*, 93 Fed. Rep. 330; *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513, 2 N. E. Rep. 89; *Overman v. Hoboken City Bank*, 30 N. J. Law 61; *Louisiana Ice Co. v. State Nat. Bank*, McGloin (La.) 181.

In the case of *National Exchange Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. Rep. 1026, where a drawee bank, which had paid a check at the clearing house in ignorance of the drawer's insolvency, brought action against the payee of the check, it appearing that the drawee had not returned the check within the time required by the clearing house rule, the court said: "It is well settled that such a regulation is binding only upon the members of the Clearing House Association. Its rules are designed exclusively for their protection and convenience as among themselves, and have no effect upon the rights or liabilities of other parties. The failure of the appellant to offer to return the checks and to demand repayment within the time prescribed by the rules of the clearing house would therefore not impair its claim against the payee for the restoration of the fund if its right of recovery should be found to be otherwise perfect. So far as the purposes of this case are concerned, the situation is precisely the same as if the appellees had in person presented the check to the appellant, and had received the money over its counter. Whether they are liable to repay it under the circumstances of the case is the sole question to be considered."

be terminated except upon notice and that the notice should not take effect until the completion of business on the day after the giving of the notice. It was held that the member bank was obliged to pay checks drawn upon the non-member and presented on the day after the giving of the notice called for by the rule, although the member bank knew at the time that the nonmember was insolvent. It was further held that the collateral in the hands of the member bank was applicable to the payment of such checks.¹⁸

18. *O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. Rep. 871. See also *Davenport v. National Bank of Commerce*, 127 N. Y. App. Div. 391, 112 N. Y. Supp. 291.

CHAPTER XVII.

CERTIFIED CHECKS.

- §230. Form of Certification.
- §231. Retention of Check as Certification.
- §232. Effect of Certification.
- §233. Right of Drawee Bank to Cancel Certified Check.
- §234. Authority of Bank Officers to Certify.
- §235. Certification of Check Drawn against Insufficient Funds.
- §236. Certification of Check Obtained by Fraud.
- §237. Certification of Altered Check.
- §238. Check Raised After Certification.
- §239. Presentment of Certified Check for Payment.
- §240. Stopping Payment of Certified Check.
- §241. Certifying Check after Payment Stopped.

§230. Form of Certification. Certification is a promise by a bank that it will pay a certain check, drawn upon it, when presented in regular course with proper indorsement. In the absence of any statute to the contrary, a bank may verbally certify a check drawn upon it.¹ In cases where the validity of verbal certifications is recognized a certification has been implied from the acts of those representing the bank, without any express promise on the part of the officers of the bank to pay. Thus, where a bank paid a check on a forgery of the payee's indorsement, it was held that such payment was equivalent to an acceptance or certification, and that the bank was liable to

1. *Jarvis v. Wilson*, 46 Conn. 90; *Second Nat. Bank v. Averell*, 2 App' Cas. (D. C.) 470; *Leach v. Hill*, 106 Iowa 171, 67 N. W. Rep. 667; *Farmers' and Merchants' Bank v. Dunbier*, 32 Neb. 487, 49 N. W. Rep. 376; *Barnet v. Smith*, 30 N. H. 256.

But, where verbal acceptances were held valid, the rule applied only in case the bank had funds of the drawer in its hands; otherwise the certification would amount to a promise on the part of the bank to pay the debt of another, and, under the statute of frauds, would have to be in writing. *Morse v. Massachusetts Nat. Bank*, Fed. Cas. No. 9, 857.

the payee.² And, where a forged certification was pronounced genuine by the teller, whose certificate it purported to be, it was held that he adopted the certification and that the bank was bound by it.³ But an offer by the drawee bank to pay a check in such funds as the drawer had on deposit, which in this instance happened to be Confederate notes, was held not to be such an acceptance as would render the bank liable on the check, and did not preclude the bank from closing the account and paying to the depositor the balance on deposit to his credit.⁴ It has also been held that the placing of a check on the canceling file by the cashier of the drawee bank cannot be construed a certification and does not prevent the return of the check upon discovering that it is not in proper form, or is drawn against insufficient funds.⁵

Statutes, however, have been enacted in a number of jurisdictions, which require all acceptances to be in writing, and while these statutes usually refer to bills of exchange, it has been uniformly held that a check is a bill of exchange within the meaning of that term as so used.⁶ The Negotiable Instruments Law, which has been adopted in nearly all of the states, provides that the acceptance of a bill of exchange "must be in writing and signed by the drawee,"⁷ and this section applies to bank checks, as well as to other bills of exchange.⁸ Under such

2. *Seventh Nat. Bank v. Cook*, 73 Pa. 483; See also *Pickle v. People's Nat. Bank*, 88 Tenn. 380, 12 S. W. Rep. 919.

See also, *supra*, §136.

3. *Continental Bank v. Commonwealth Bank*, 50 N. Y. 575.

4. *Lester v. Georgia Railroad & Banking Co.*, 42 Ga. 244.

5. *National Bank of Rockville v. Second Nat. Bank*, 69 Ind. 479.

6. *Garrettson v. North Atchinson Bank*, 47 Fed. Rep. 867; *Eakin v. Citizens State Bank*, 67 Kans. 338, 72 Pac. Rep. 874; *Duncan v. Berlin*, 60 N. Y. 151; *Risley v. Phenix Bank*, 83 N. Y. 318; *National State Bank v. Linderman*, 161 Pa. 199, 28 Atl. Rep. 1022; *Baltimore & Ohio R. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. Rep. 837.

A bank check was held to be a bill of exchange, within the meaning of the Kansas statute, providing that an acceptance of a bill of exchange, written on paper other than the bill "shall not bind the acceptor except in favor of a person to whom such acceptance shall have been shown, and who in faith thereof, shall have received the bill for a valuable consideration." *Eakin v. Citizens' State Bank*, 67 Kans. 338, 72 Pac. Rep. 874, construing section 9, chap. 14, Gen. Stat. of Kans., 1901.

7. Section 220 of the New York act.

8. *Van Buskirk v. State Bank*, 35 Colo. 142, 83 Pac. Rep. 778; *Baltimore & Ohio R. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. Rep.

a statute the bank is not liable to the holder of a check, even though the holder took the check upon the faith of the verbal statement of an officer of the bank that the check was good.⁹

In the state of Texas, which is one of the few jurisdictions in which the uniform Negotiable Instruments Law is not in force, a check may be accepted verbally, but, in order for such a certification to be binding it must appear that the check was taken upon the strength of the bank's verbal statement.¹⁰

Where a written certification is required it is customary to write the word "good," or "accepted," or some similar word across the face of the check, followed by the signature or initials of the officer representing the bank in the transaction. But any word, or combination of words, which sufficiently indicates the intention of the bank to certify, will accomplish the certification, provided it is signed by an officer of the bank having authority for that purpose.

A certification need not necessarily be written on the check itself, but may upon a separate piece of paper. In such case, however, the certification does not bind the bank except in favor of a person to whom it is shown and who, on faith thereof, receives the check for value.¹¹ And where the certification is made upon a separate paper, as where it is sent in the form of a telegram, the language used must clearly and unequivocally import an absolute promise to pay, or it will not be regarded as binding. Where a person, who is about to receive a check, wires to the drawee bank, in effect, "Is A's check good?" and the bank answers by telegram, stating that A's check is good, there is no certification. The reason is that there is no absolute promise to pay the check. All that can be made out of such a statement by the bank is an acknowledgment that A's account is good for the amount named at the time of the sending of the telegram. But, if the purport of the inquiry is "Will you pay?" and the answer is "We will," there is no doubt as to the object of the inquiry and the meaning of the reply; in

837; *Ballen & Friedman v. Bank of Krenlin, Okla.*, 130 Pac. Rep. 539; *Rambo v. First State Bank, Kans.*, 128 Pac. Rep. 182.

9. *Van Buskirk v. State Bank*, 35 Colo. 142, 83 Pac. Rep. 778.

10. *Home Nat. Bank v. First State Bank, Texas*, 133 S. W. Rep. 935.

11. *Neg. Inst. L.*, Sec. 222 of the N. Y. Act.

such a case there^{*} is an absolute promise to pay the check upon presentment and the same constitutes a valid certification.¹²

§231. Retention of Check as Certification.—Where the matter is uncontrolled by statute, the mere retention of a bill by the drawee, unqualified by any adventitious circumstance, such as a usage of trade, or an understood method of dealing between the parties, will not be considered equivalent to an acceptance. It is the business of a holder to present his bill, and the drawee has a reasonable time thereafter in which to inspect his accounts for the purpose of finding out what funds belonging to the drawer are in his hands. It has been held that twenty four hours is a reasonable time. After the lapse of a reasonable time the holder is entitled to know whether his bill is accepted, but it his duty to wait upon the drawee to ascertain this. This applies to checks as well as to other bills. If a check, instead of being presented at the counter of the drawee bank, is forwarded by mail, the drawee, in the absence of any statute or any established course of dealing, is under no obligation to return the check, in case of non-payment, but may safely wait in silence the further action of the holder.¹³

12. In reply to an inquiry as to whether D's check was good, the drawee bank wired, "D's check is good for sum named." It was held that this was merely an assurance that the account was good at the time the telegram was sent and was not binding as a certification. *First Nat. Bank v. Commercial Sav. Bank*, 74 Kans. 606, 87 Pac. Rep. 746.

A person wired a bank, "Are W's checks for \$2,000 good?" The bank wired back, "Yes sir." This was held not binding as a certification. *Kahn v. Walton*, 46 Ohio St. 195.

An inquiry as to whether a check was good was answered, "James Tate is good; send on your paper." This was held a valid certification. *North Atchinson Bank v. Garretson*, 51 Fed. Rep. 168.

A telegraphic inquiry read, "Will you pays I's check for \$1,800 on presentation?" The bank's answer was, "Yes, will pay the I check." It was held that this constituted a certification. *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648, 16 S. W. Rep. 321.

In reply to an inquiry whether A's check would be paid a bank wired, "B has deposited with us \$1,790 to pay check drawn by A in favor of C." It was held that this was an acceptance making the bank liable for the payment of the check. *Elliott v. First State Bank, Texas*, 152 S. W. Rep. 808.

13. *Overman v. Hoboken City Bank*, 31 N. J. L. 563, decided in 1864, wherein a check, which had been sent to the drawee bank, was retained

The Negotiable Instruments Law now provides that the drawee is allowed twenty four hours after presentment in which to decide whether or not he will accept the bill.¹⁴ By the same statute it is provided that, where a drawee, to whom a bill is delivered for acceptance, destroys the same, or refuses within twenty four hours after such delivery, or within such period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.¹⁵ The question has been raised whether this provision contemplates an affirmative refusal to return the bill, or a mere neglect or omission to return it. The New York Court of Appeals, construing an earlier, but similar statute, has held that a mere omission to return a bill is not a "refusal" within the meaning of the statute and cannot be construed as an acceptance.¹⁶ But, in a recent decision, the Supreme Court of Penn-

by the bank for about twenty four hours and then returned dishonored; it was held that such retention did not in itself constitute an acceptance.

Where a check was sent to the drawee bank with instructions to "return it promptly if not paid," and the drawee retained it for more than three days, when the drawer stopped payment, it was held that whether the retention amounted to an acceptance was a question for the jury, and the jury decided that the bank's conduct was consistent with an acceptance. The court said: "If a refusal was intended, notice would naturally, and ought legally, to have been given at once, either on the same, or at the farthest, the next day." *First Nat. Bank v. McMichael*, 106 Pa. 460.

In *Walnut Hill Bank v. National Reserve Bank*, 65 Misc. Rep. (N. Y.) 315, 121 N. Y. Supp. 892, it was held that the retention of a check for several weeks by the drawee bank, to which it had been sent by the holder for deposit to his credit, without notice to the depositor that it was not good, rendered the drawee liable to the depositor for the amount of the check. It appeared that during the time the check was retained without notice, the circumstances of the drawer changed so that the depositor would have been prejudiced by treating the check as unpaid. It was also held in this case that a card acknowledging the receipt of the check bearing a printed notice "All items sent to us are credited subject to payment," applied only to items drawn on other banks.

14. Sec. 224 of the New York Act.

15. Sec. 225 of the New York Act. See *State Bank v. Weiss*, 46 Misc. Rep. (N. Y.) 93.

16. *Matteson v. Moulton*, 79 N. Y. 627.

A check has been held not to be a bill of exchange within the meaning of a statute, providing that "every person on whom a bill of exchange may be drawn, and to whom the same shall be delivered for acceptance who shall destroy such bill, or refuse, within twenty-four hours after such delivery or within such period as the holder may allow, to return the bill,

sylvania, construing the provision of the Negotiable Instruments Law of that state, has held that the failure or neglect of a drawee, to whom a bill is delivered for acceptance to return the bill, accepted or non-accepted, within twenty four hours after delivery, makes the drawee an acceptor of the bill, and that no affirmative act of refusal is required.¹⁷

§232. Effect of Certification.—The certification of a check is equivalent to the acceptance of a bill of exchange. It is an admission by the certifying bank that the signature of the drawer is genuine, and if the bank certifies a check, on which the signature of the drawer is a forgery, it will be held liable thereon to a bona fide purchaser of the check.¹⁸ The certification also admits that the drawer has on deposit a sum sufficient to pay the check,¹⁹ and it imports an agreement and undertaking by the bank to retain out of the money on deposit to the drawer's credit a sum sufficient to meet the check, and to honor the check when duly presented.²⁰

accepted or non accepted, to the holder, shall be deemed to have accepted the same." *Hays v. Lathrop Bank*, 75 Mo. App. 211.

17. *Wisner v. First Nat. Bank*, 220 Pa. 21, 68 Atl. Rep. 955, construing sec. 137 of the Pennsylvania Neg. Inst. Law; see also *State Bank v. Weiss*, 46 Misc. Rep. (N. Y.) 93, 91 N. Y. Supp. 276; *Provident Securities & Banking Co. v. First Nat. Bank*, 37 Pa. Super. Ct. 17.

The Negotiable Instruments Law, as adopted in Wisconsin, removes all doubt as to the rule in that state by adding these words: " Mere retention of the bill is not acceptance."

18. *Hagen v. Bowery Nat. Bank*, 64 Barb. (N. Y.) 197.

A person named Gaughan opened a bank account with the plaintiff under the name of Cawley. Subsequently he forged the signature of a depositor of the defendant bank on a check and presented it to the defendant for certification. The check was certified by stamping it " good when properly indorsed." Gaughan indorsed it to the plaintiff, using a rubber stamp for that purpose, and afterwards the defendant refused to pay it on the ground that it was not properly indorsed, but Gaughan had already withdrawn the amount with a check signed in his assumed name. It was held that the defendant bank was liable upon its certification. *Adam v. Manufacturers' & Traders' Nat. Bk.* 116 N. Y. Supp. 595, 63 Misc. Rep. (N. Y.) 403.

19. See, *infra* §235.

20. *Merchants' Bank v. Baird*, 160 Fed. Rep. 642; *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 65 N. E. Rep. 136; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. Rep. 739; *Goshen*

The certification constitutes a new contract between the holder and the bank. The amount of the check is set apart out of the drawer's deposit for the purpose of paying the check. The drawer no longer has any right to draw that money out of the bank. In legal contemplation and effect a certified check is the certificate of deposit of the certifying bank.²¹ By certifying the drawee bank enters into an absolute agreement to pay the check upon presentment at any time within the time fixed by the statute of limitations.²² But, in order that the holder of such a check may recover from the bank it must appear that he became the holder for value, in good faith and without notice of the unauthorized certification, or of any other defect in the instrument.²³ So, it is held that, where a check is post-

Nat. Bank v. Bingham, 7 N. Y. St. Rep. 493; Herrmann Furniture Works v. German Exchange Bank, 87 N. Y. Supp. 462; Meads v. Merchants' Bank, 25 N. Y. 143; Blake v. Hamilton Dime Sav. Bank, 79 Ohio St. 189, 87 N. E. Rep. 73; Central Guarantee Trust Co. v. White, 206 Pa. 611, 56 Atl. Rep. 76; Andrews v. German Nat. Bank, 59 Tenn. 211; First Nat. Bank v. Bank of Ravenswood, W. Va., 133 S. W. Rep. 581.

"By the law merchant of this country, the certificate of a bank that a check is good is equivalent to acceptance. It implies that the check is drawn on sufficient funds in the hands of the drawee, and that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check as regards both parties is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank." Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008.

A depositor in the defendant bank drew two checks, each for \$1,000, payable to the same party, and had one of them certified. The uncertified check was presented first and protested for want of sufficient funds. The certified check was presented later and protested by mistake. The defendant, in attempting to rectify this mistake in protesting the certified check, paid the uncertified check. When sued on the certified check it claimed that the deposit was sufficient to pay but one of the checks and that it had paid the uncertified check in the mistaken belief that it was the certified check. It was held that it was nevertheless liable on the certified check. First Nat. Bank v. Bank of Ravenswood, W. Va., 133 S. W. Rep. 581.

21. Wright v. McCarty, 92 Ill. App. 120.

22. Muth v. St. Louis Trust Co., 88 Mo. App. 596; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. Rep. 136.

23. Clarke Nat. Bank v. Bank of Albion, 52 Barb. (N. Y.) 592.

dated and is certified by the drawee bank prior to the time of its date, one who takes the check, by indorsement before the date of the check arrives cannot recover thereon from the bank. He has notice from the face of the check of its wrongful certification.²⁴ Where the holder of a check has it certified, the check is, as between the drawer and holder, regarded as paid, and the bank is not rendered liable to the drawer's creditors by paying the check after receiving notice of the drawer's insolvency.²⁵

While certification admits the genuineness of the drawer's signature and the sufficiency of his account, it does not warrant the genuineness of the body of the check as against alteration or forgery,²⁶ nor does it admit the genuineness of the indorsements. Consequently, where a bank has paid a check drawn upon it, and afterwards discovers that the payee's indorsement was a forgery, it may recover the money from the party to whom it was paid, notwithstanding that the check had previously been certified.²⁷ This rule rests upon the plain reason that a bank is presumed to know the signature of its depositor and the condition of his account, but cannot be presumed to know the handwriting in the body of the check nor the handwriting of the indorsers. In other words certification has reference to facts, which are legitimately chargeable to the knowledge of the certifying bank, and not to any other fact about the paper.²⁸

A distinction is drawn between the effect of certification at the instance of the holder of a check and certification at the drawer's request before delivery. When the holder of a check has it certified the drawer and all indorsers are discharged from liability thereon.²⁹ This provision is now a part of the Nego-

24. *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592.

25. *Strauss v. American Exch. Nat. Bank*, 72 Ill. App. 314.

26. See, *infra* §237.

27. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. Rep. 739.

28. *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272, 65 N. E. Rep. 1108.

29. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall, (U. S.) 604; *Wright v. McCarty*, 92 Ill. App. 120; *First Nat. Bank v. Currie*, 147 Mich. 72, 110 N. W. Rep. 499; *Times Square Automobile Co. v. Rutherford Nat. Bank*, 77 N. J. L. 649, 73 Atl. Rep. 479; *Dunn v. Whalen*, 120 N. Y. App. Div. 729, 105 N. Y. Supp. 588; *First Nat. Bank v. Leach*,

liable Instruments Law.³⁰ The holder of a check is entitled to present it for payment only, and the bank on which it is drawn is under an obligation to the drawer to pay it upon presentment. When the check is presented the bank is presumably ready to pay it, provided it is regular and there are sufficient funds on deposit for that purpose. If the holder requests certification instead of payment, he enters into a new contract with the bank, and one which was not within the contemplation of the drawer. And the law will not permit the money to be thus left in the bank, after the presentment of the check, for the accommodation of the holder, without discharging the drawer. The act of the holder of a check, in having it certified, releases the drawer and prior indorsers, notwithstanding that the check is subsequently presented for payment, payment refused, and notice of dishonor given within the time required by law.³¹

If the check is certified prior to its delivery to the payee the drawer remains liable thereon,³² even though the certification is had at the special request of the payee.³³

In cases where certification is obtained by the drawer before delivery the character of the drawer's liability is not thereby changed, and the ordinary rules as to presentment and notice of dishonor must be complied with, in order to fix his liability, just as in the case of an uncertified check.³⁴

§233. Right of Drawee Bank to Cancel Certified Check.—

A bank, which has certified a check drawn upon it at the instance

52 N. Y. 350; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Meuer v. Phenix Nat. Bank*, 94 N. Y. App. Div. 331, 88 N. Y. Supp. 83; *Girard Bank v. Bank of Pennsylvania*, 39 Pa. 92.

30. Sec. 324 of the New York Act.

31. *First Nat. Bank v. Currie*, 147 Mich. 72, 110 N. W. Rep. 499.

32. *Brown v. Leckie*, 43 Ill. 497; *Born v. First Nat. Bank*, 123 Ind. 78, 24 N. E. Rep. 173; *Minot v. Russ*, 156 Mass. 458, 31 N. E. Rep. 489; *Cullinan v. Union Surety Co.* 79 N. Y. App. Div. 409; *Davenport v. Palmer*, 137 N. Y. Supp. 796.

33. *Born v. First Nat. Bank*, 123 Ind. 78, 24 N. E. Rep. 173; *Davenport v. Palmer*, 137 N. Y. Supp. 796.

In *Randolph Nat. Bank v. Hornblower*, 160 Mass. 401, where the payee of a check insisted that it be certified and at the drawer's request, the payee's messenger got the check from the drawer, had it certified and then delivered it to the payee, it was held that the drawer was not released by the certification.

34. *Andrews v. German Nat. Bank*, 59 Tenn. 211.

of the drawer, may cancel the certification upon the drawer's request at any time before any third party has acquired a right in the instrument. In fact, the drawer of a check, who has had it certified, is entitled to withdraw it at any time before he has parted with it, or at least at any time before the payee has consented to accept the stipulation in his favor, and upon request by the drawer in such a case, the drawee bank cannot refuse to cancel or redeem the check.³⁵ The fact that the drawer of a check, who has had it certified, has the check in his possession raises a presumption that the check has not been delivered to the payee and that the latter has gained no interest therein, and the bank is entitled to act upon that presumption and cancel the check if requested to do so by the drawer.³⁶

§234. Authority of Bank Officers to Certify.—When the officers of a bank, authorized to certify checks, are not designated in the by-laws of the bank, the question frequently arises as to which officers have authority to certify by virtue of the offices which they hold. Though it is a power they seldom, if ever, exercise, the directors of a bank, acting as a board, undoubtedly have inherent authority to certify, for they are the bank's managers and its representatives in the broadest sense. In numerous cases it has been held that the cashier, by virtue of his office, has inherent power to certify checks.³⁷ The direc-

35. *Abrams & Co. v. Union Nat. Bank*, 31 La. Ann. 61. In this case it was held that, where a bank certified a check payable to order, and the drawer subsequently altered it making it payable to bearer, and as thus altered the check was paid to an unknown person before the payee was advised of the certification, and before any other party had acquired an interest in the check, the bank was not liable for any loss to others caused by paying the check, because of an agreement between such others and the drawer, of which the bank had no knowledge.

36. *Buehler v. Galt*, 35 Ill. App. 225. In this case the drawer of the check had it certified and mailed it to the payee. The check was not received by the payee and in some way, which does not appear in the case, the drawer regained possession of it and had the certification cancelled by the drawee bank. It was held that the drawee was justified in cancelling the check and was not liable to the payee. Placing the check in the mails did not constitute a delivery to the payee and the fact that the check was in the drawer's possession, raised a presumption that there had been no delivery, upon which the bank was entitled to act.

37. *Merchants Nat. Bank v. Boston State Nat. Bank*, 10 Wall (U. S.) 604; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Muth v. St. Louis Trust Co.*, 94 Mo. App. 94, 67 S. W. Rep. 978; *Dorsey v. Abrams*, 85 Pa. St. 299.

tors may limit the authority of the cashier in this respect, but the limitation is not binding on persons dealing with the bank to whom it is not known.³⁸ The cashier has no authority by virtue of his office to certify his individual check on the bank,³⁹ nor has he any authority to certify a post-dated check.⁴⁰

It has been held that the assistant cashier has no inherent authority to certify checks. Such a certification is not binding on the bank even as to a bona fide holder of the certified check, in the absence of proof that this method of certification was the regular practice of the bank.⁴¹ Inherent authority on the part of the teller to bind the bank by certification has been conceded by some decisions.⁴² But, even where the teller is deemed to be without inherent authority to certify, it is held that if he is in the habit of certifying with knowledge and consent of the bank, his acts of certification are binding on the bank.⁴³

It has been held that the president of a bank may not certify his own check. The holders of checks, drawn on a bank by its president and certified by the president, cannot be bona fide holders, because the fact that the checks are both drawn and certified by the president is a patent on their faces, and they cannot, therefore, enforce such checks against the bank.⁴⁴

§235. Certification of Check Drawn against Insufficient Funds.—A bank, which knowingly certifies a check at a time when the drawer has no funds in the bank, or when the amount

38. *Merchants' Nat. Bank v. Boston State Nat. Bank*, 10 Wall (U. S.) 604.

39. *Gale v. Chase Nat. Bank*, 104 Fed. Rep. 214; *Lee v. Smith*, 84 Mo. 304; *Lowndes v. City Nat. Bank*, 82 Conn. 8, 72 Atl. Rep. 150; *Claffin v. Farmers' etc., Bank*, 25 N. Y. 293.

40. *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. (N. Y.) 592.

41. *Pope v. Bank of Albion*, 57 N. Y. 126.

42. *Union Trust Co. v. Preston*, 136 Mich. 460, 99 N. W. Rep. 399; *Clews v. Bank of New York*, 114 N. Y. 70; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *Contra, Mussey v. Eagle Bank*, 9 Metc. (Mass.) 306; *Muth v. St. Louis Trust Co.*, 94 Mo. App. 94, 88 Mo. App. 596.

43. *Muth v. St. Louis Trust Co.*, 94 Mo. App. 94, 67 S. W. Rep. 978; *Meads v. Merchants' Bank*, 25 N. Y. 143.

44. *Claffin v. Farmers' etc., Bank*, 25 N. Y. 293. In this case the plaintiffs held the checks for a year without presenting them and without making any arrangement for their payment.

on deposit to the drawer's credit is insufficient to pay the check, may be held liable for the full amount of the check at the instance of a bona fide holder thereof,⁴⁵ and this is so even in a case where the certification was made in violation of a statute against certifying checks in the absence of funds on deposit to the drawer's credit.⁴⁶ In this regard the payee of a check, who has it certified, may be a bona fide holder thereof and entitled to recover upon the certification, although the drawer had no funds in the bank at the time the check was certified.⁴⁷ But, if the payee has the check certified, knowing that the drawer is without funds in the bank, he is not a bona fide holder and cannot recover from the bank on the certification.⁴⁸

The foregoing rules are applied in cases where the bank has knowledge of the insufficiency of the drawer's credit. In a case where the bank certifies a check in the mistaken belief that the drawer had on deposit to his credit sufficient funds for that purpose, it may correct the mistake and cancel the certification by giving notice to the holder before the check has passed from his hands to the hands of a bona fide holder, unless there has been a change of circumstances by reason of the mistaken certification. In other words, where a bank certifies a check at the instance of the holder, in the mistaken belief that the funds are sufficient, and the mistake is discovered and notice given to the holder before he has suffered any loss as a result of the certification, and before the rights of any third parties have attached, the bank is liable to the holder on the certifica-

45. *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 99 N. W. Rep. 399; *First Nat. Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. Rep. 547; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 623; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Meads v. Merchants' Bank*, 25 N. Y. 143.

Where the drawer of a check, payable to his own order, procured its certification by fraud, it was held that the bank was not liable to one who took it for value without notice, but failed to have it indorsed by the payee. *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349, 23 N. E. Rep. 180.

46. *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 99 N. W. Rep. 399; *First Nat. Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. Rep. 547.

47. *First Nat. Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. Rep. 547.

48. *First Nat. Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. Rep. 547.

tion only to the extent of the depositor's actual balance at the time of the certification.⁴⁹

Where a broker pledged securities to a national bank, which then certified his checks although he had no cash deposit in the bank, it was held that the fact that such certification was in violation of the United States statutes did not deprive the bank of its lien against the securities.⁵⁰ The penalty for such a violation by a national bank is the forfeiture of its charter and the winding up of its affairs, and the officers who unlawfully certify are made guilty of a criminal offense, but the corporation is entitled to the benefit of the pledged securities.

§236. Certification of Check Obtained by Fraud.—A bank, which has certified a check at the request of a person, who obtained it by fraud from the drawer, cannot set up the fraud as a defense against a holder for value without notice.⁵¹ It has

49. *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 71; *Irving Bank v. Wetherald*, 36 N. Y. 335; *Brooklyn Trust Co. v. Toler*, 65 Hun (N. Y.) 187; *Rankin v. Colonial Bank*, 64 N. Y. Supp. 32, 31 Misc. Rep. (N. Y.) 227; See also *Bank of the Republic v. Baxter*, 31 Vt. 101.

A note payable at a bank was certified in the mistaken belief that the maker's account was sufficiently large to pay it. The bank notified the owner and indorser but the note was presented through the clearing house, the rules of which required payment and rectification afterwards directly between banks. It was held that the payment through the clearing house was not a voluntary one and that the bank could recover from the owner of the note the money paid. *Mt. Morris Bank v. Twenty Third Ward Bank*, 60 N. Y. App. Div. 205, 70 N. Y. Supp. 78.

50. *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240.

Where the defendant national bank advised plaintiff that it would pay checks drawn by a third person, though such person had no funds on deposit, and the plaintiff cashed such checks in reliance thereon, it was held that there was no certification, but a guaranty not within the powers of a national bank, and that the defendant was not liable thereon. *Bowen v. Needles Nat. Bank*, 94 Fed. Rep. 925.

51. *Merchants' Loan & Trust Co. v. Metropolis Bank*, 7 Daly (N. Y.) 137, where it appeared that a person, wrongfully representing himself to be one Frothingham, obtained a check from the drawer by fraud and afterwards had it certified by the defendant bank, on which the check was drawn. The perpetrator of the fraud then managed to get himself identified to the plaintiff bank as the payee named in the check, and the plaintiff thereupon cashed the check. It was held that the defendant was liable on its certification.

See also *Blake v. Hamilton Dime Savings Bank*, 79 Ohio St. 189, 87 N. E. Rep. 73.

been held that a bank which has certified a check cannot resist an action thereon by the holder on the ground that the check was obtained from the drawer by false representations, even in a case where it is claimed that the false representations were made by the party bringing the suit. In such case the situation is the same, so far as the bank is concerned, as though the drawer had given the payee cash instead of a check, and the payee had deposited the cash in the bank.⁵²

§237. Certification of Altered Check.—The right of a bank, which has erroneously certified a check, after it has been fraudulently raised in amount, or otherwise altered, to bring an action for the recovery of the amount, as moneys paid by mistake, as a general proposition, is not questioned.⁵³ In a case where the payee named in a check, having doubts as to the genuineness of the check, presented it to the teller of the drawee bank, who certified it and stated that it was "correct in every particular," whereupon the payee parted with value in exchange for the check, it was held that the drawee could recover the amount it subsequently paid on the check from the bank to which such payment was made, upon its being discovered that the check had been raised and altered as to payee and date. It was not part of the teller's duty to give assurance as to the genuineness of the check, except as to the drawer's signature. In going beyond this his representations did not bind the bank.⁵⁴

But, when a bank is culpably negligent in certifying a check and in paying and thereafter retaining the check, it will not be allowed to recover the money from a person who was innocent of any fraud and who has relied on the certification and pay-

52. *Times Square Automobile Co. v. Rutherford Nat. Bank*, 77 N. J. L. 649, 73 Atl. Rep. 479.

53. *Metropolitan Nat. Bank v. Merchants' Nat. Bank*, 182 Ill. 367, 55 N. E. Rep. 360; *Parke v. Roser*, 67 Ind. 500; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; *Security Bank v. National Bank of the Republic*, 67 N. Y. 458; *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272, 65 N. E. Rep. 1108.

In Louisiana it has been held that a bank is liable to a bona fide purchaser of a check, which it had certified, even though the check was fraudulently raised before the certification took place. *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189.

54. *Security Bank v. National Bank of the Republic*, 67 N. Y. 458.

ment to his detriment.⁵⁵ Thus, where a bank certified a check, drawn on it by another bank, although it had received a letter of advice, reference to which would have shown that the check had been altered as to date and raised in amount, and subsequently paid the check, and did not discover the fraud until the bank to which the payment had been made had paid the money over to the party for whom it made the collection, it was held that the latter bank was not liable to the certifying bank.⁵⁶ And a bank which certifies a check and afterwards finds out that the check was fraudulently raised before the certification, may be precluded from recovering by delay in giving notice after the discovery of the forgery.⁵⁷

§238. Check Raised After Certification.—Where a check is raised in amount after it has been certified by the drawee bank, the bank is not liable, even to a bona fide holder, for the amount by which the check is raised, and if by mistake such a check is paid, the bank may recover back the excess over the amount for which the check was originally drawn, unless the holder has suffered a loss in consequence of the bank's mistake.⁵⁸

A bank may, however, be guilty of such negligence, in connection with a transaction of this kind, as to render it liable

55. *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272, 65 N. E. Rep. 1108.

56. *Continental Nat. Bank v. Tradesmen's Nat. Bank*, 173 N. Y. 272, 65 N. E. Rep. 1108.

57. *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. App. 455. In this case the plaintiff certified a check, payable to the order of one Harper, which had been raised from \$33 to \$3,300, and later paid it to the defendant bank, which in turn paid the money to the bank in which Harper had deposited the check. The plaintiff discovered the fraud four days after the payment, and prosecuted an unsuccessful suit against the bank in which the check had been deposited. After nearly five years it notified the defendant of the loss and commenced suit against it. It was held that the delay precluded a recovery, since "reasonable diligence is required in giving notice of forgery after its discovery."

58. *National Bank of Commerce v. National Mechanics' Banking Assoc.*, 55 N. Y. 211.

Where the drawer of a check, payable to a certain person or his order, has it certified, he may, at any time before delivering it to a third person, alter it by making it payable to bearer, and such alteration does not affect the validity of the check. *Abrams & Co. v. Union Nat. Bank*, 31 La. Ann. 61.

on the check. In a New York case the defendant bank, after having certified a check, was notified by the drawer to stop payment, and a memorandum of this instruction was entered in the register along with the record of certification. Later the check was offered to the plaintiffs in payment for certain bonds, and they presented it to the defendant's paying teller and inquired if the certification was good. Without referring to the register the teller answered affirmatively. In an action to recover the amount of the check, as raised, it was held that the evidence was sufficient to justify a finding of negligence on the part of the defendant bank, in failing to disclose to the plaintiffs the facts within its knowledge, and to authorize a recovery.⁵⁹

§239. Presentment of Certified Check for Payment.—The rules regulating the presentment of certified checks for payment have been considered in the chapter on Presentment for Payment.⁶⁰

§240. Stopping Payment of Certified Check.—In general the drawer of a check has the right to direct the drawee bank to stop payment of the check and, if the bank neglects to carry out the drawer's instructions, it will be held liable to the drawer for the amount paid out. If the check has reached the hands of a holder in due course, it may be that the drawer will be held liable to such holder, but that is a matter between the drawer and holder, with which the bank has nothing to do. The bank is under no obligation to the holder; but to the drawer it owes the duty of obeying his instructions in regard to the payment or non-payment of checks. The principles applying to the countermanding of checks have been discussed in other sections.⁶¹ But, once a check has been certified the drawer loses his control over it, and he has no power to stop payment of it as against a holder in due course.⁶²

59. *Clews v. Bank of New York*, 114 N. Y. 70.

60. See, *supra*, §80.

61. See, *supra*, Chapter XIII.

62. *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 33 N. E. Rep. 247; *Freund v. Importers' etc. Nat. Bank*, 76 N. Y. 352; *Herrmann Furniture Works v. German Exchange Bank*, 87 N. Y. Supp. 462; *Nolan v.*

A bank, in which a certified check is deposited by the holder, and which gives the depositor credit therefor, is held to be a holder in due course, and entitled to recover on the certification against the drawee bank, notwithstanding the countermanding of payment, and even though such bank was notified that the check was fraudulently obtained and that payment had been stopped, before it had paid the amount thereof to its depositor.⁶³

The fact that the drawer of a check discovers, after the check has been certified at the instance of the payee, that the payee is insolvent does not entitle the drawer to countermand payment so as to enable him to make use of a setoff or counterclaim, which, except for certification, would have been available against the payee. In such circumstances the drawee may not resist the payee's claim and is liable on the check in an action by the payee, notwithstanding the stopping of payment by the drawer.⁶⁴

Bank of New York, 67 Barb. (N. Y.) 24; Poess v. Twelfth Ward Bank, 43 Misc. Rep. (N. Y.) 45, 86 N. Y. Supp. 857; Drinkall v. Bank, 11 N. D. 10, 88 N. W. Rep. 724; Blake v. Hamilton Dime Savings Bank, 79 Ohio St. 189, 87 N. E. Rep. 73; Farmers' & Merchants' Nat. Bank v. Elizabethtown Nat. Bank, 30 Pa. Super Ct. 271; Pease & Dwyer v. State Nat. Bank, 114 Tenn. 693, 88 S. W. Rep. 172.

A bank teller, upon the presentment of a certified check, wrote across the face the words "Payment Stopped," and returned it to the payee, who erased these words, placed a revenue stamp over the erasure and transferred the check to a *bona fide* holder. It was held that the bank was liable. It had no right to make the indorsement and the payee had the right to erase it. Nassau Bank v. Broadway Bank, 54 Barb. (N. Y.) 236.

63. Blake v. Hamilton Dime Savings Bank, 79 Ohio St. 189, 87 N. E. Rep. 73.

64. Carnegie Trust Co. v. First Nat. Bank, N. Y., 107 N. E. Rep. 693. In this case it appeared that a Cincinnati bank forwarded its check to the plaintiff trust company in New York, drawn on the defendant, a New York Bank. At the time of the arrival of the check the plaintiff had failed and was in the control of the superintendent of banks. The check was sent around to the drawee bank and was certified by it. Shortly afterward the drawee bank received a telegram from the Cincinnati bank instructing it to stop payment, the reason being that the plaintiff was indebted to the Cincinnati bank in a sum larger than the amount of the check. It was held that the drawee could not resist the enforcement of its contract of certification in order that the Cincinnati bank might avail itself of its right of setoff against the plaintiff.

§241. Certifying Check After Payment Stopped.—A bank should not, of course, certify a check after the drawer has stopped payment on it. It has been held, however, that where a bank has certified a check by mistake after payment has been stopped, it may correct the error by immediately notifying the holder before the check has passed from his hands to those of a bona fide owner.⁶⁵

65. Security Savings & Trust Co. v. King, Ore., 138 Pac. Rep. 465.

APPENDIX

THE NEGOTIABLE INSTRUMENTS LAW

A general act relating to negotiable instruments, its object being to make uniform throughout the United States the law relating to negotiable commercial paper, which has been adopted in forty-three of the States and in the District of Columbia and Hawaii.

LIST OF STATES AND TERRITORIES IN WHICH
THE NEGOTIABLE INSTRUMENTS LAW HAS
BEEN ADOPTED.

Alabama. Laws of 1907, No. 722, p. 660. In effect January 1, 1908.

Arizona. Rev. St. 1901, page 852; Laws 1905, Ch. 23. In effect September 1, 1901.

Arkansas. Law of 1913, Act 81. In effect April 22, 1913.

Colorado. Laws of 1897, Ch. 64. Approved April 20, 1897.

Connecticut. Laws of 1897, Ch. 74. Approved April 5, 1897.

Delaware. Laws of 1911, Ch. 191. In effect January 1, 1912.

District of Columbia. Laws of 1899, Chap. 47; 30 U. S. Stat. at L., p. 785. In effect April 3, 1899.

Florida. Laws of 1897, Chap. 4524. Approved June 1, 1897.

Hawaii. Laws of 1907, Act 89. In effect April 20, 1907.

Idaho. Laws of 1903, p. 380. In effect March 10, 1903.

Illinois. Laws of 1907, p. 403. Approved June 5, 1907.

Indiana. Laws of 1913, Chap. 63. Approved March 3, 1913.

Iowa. Laws of 1902, Chap. 130; Laws of 1906, Chap. 149. Approved April 12, 1902.

Kansas. Laws of 1905, Chap. 310. In effect June 8, 1905.

Kentucky. Laws of 1904, Chap. 102. Approved March 24, 1904.

Louisiana. Laws of 1904, Act 64. Approved June 29, 1904.

Maryland. Laws of 1898, Chap. 119. Approved March 29, 1898.

Massachusetts. Laws of 1898, Chap. 533; Laws of 1899, Chap. 130. In effect January 1, 1899.

Michigan. Laws of 1905, Chap. 265, p. 389. Approved June 16, 1905.

Minnesota. Laws of 1913, Chap. 272. In effect July 1, 1913.

Missouri. Laws of 1905, p. 243. Approved April 10, 1905.

Montana. Laws of 1903, Chap. 121. In effect March 7, 1903.

Nebraska. Laws of 1905, Chap. 83. In effect August 1, 1905.

Nevada. Laws of 1907, Chap. 62. In effect May 1, 1907.

New Hampshire. Laws 1909, Chap. 123. In effect January 1, 1910.

New Jersey. Laws of 1902, Chap. 184. Approved April 4, 1902.

New Mexico. Laws of 1907, Chap. 83. Approved March 21, 1907.

New York. Laws of 1897, Chap. 612; Laws of 1898, Chap. 336. In effect October 1, 1897.

North Carolina. Laws of 1899, Chap. 733; Laws of 1905, Chap. 327; Laws of 1907, Chap. 897. In effect March 8, 1899.

North Dakota. Laws of 1899, Chap. 113. Approved March 7, 1899.

Ohio. Laws of 1902, p. 162. In effect January 1, 1903.

Oklahoma. Laws of 1909, Chap. 24. In effect June 10, 1909.

Oregon. Laws of 1899, p. 18. Approved February 16, 1899.

Pennsylvania. Laws of 1901, p. 194. In effect September 2, 1901.

Rhode Island. Laws of 1899, Chap. 674. In effect July 1, 1899.

South Carolina. Laws of 1914, Act No. 396, p. 668. Vetoed by the governor March 4, 1914 and passed by both Houses over his veto.

South Dakota. Laws of 1913, Chap. 279. Approved March 4, 1913.

Tennessee. Laws of 1899, Chap. 94. In effect May 16, 1899.

Utah. Laws of 1899, Chap. 83. In effect July 1, 1899.

Vermont. Laws of 1912, p. 114. In effect June 1, 1913.

Virginia. Laws of 1898, Chap. 866. Approved March 3, 1898.

Washington. Laws of 1899, Chap. 149. In effect March 22, 1899.

West Virginia. Laws of 1907, Chap. 81. In effect January 1, 1908.

Wisconsin. Laws of 1899, Chap. 356. In effect May 15, 1899.

Wyoming. Laws of 1905, Chap. 43. In effect February 15, 1905.

THE NEGOTIABLE INSTRUMENTS LAW.

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THE NEGOTIABLE INSTRUMENTS LAW.*

ARTICLE I.

GENERAL PROVISIONS.

- §1. Short title.
- §2. Definitions and meaning of terms.
- §3. Person primarily liable on instrument.
- §4. Reasonable time, what constitutes.
- §5. Time, how computed; when last day falls on holiday.
- §6. Application of chapter.
- §7. Rule of law merchant; when governs.

§1. **Short title.**—This act shall be known as the negotiable instruments law.

Arkansas, Delaware, Indiana, Minnesota and Vermont. This section reads, " This act may be cited as the Uniform Negotiable Instruments Act."

Nebraska. This section is omitted.

§2. **Definitions and meaning of terms.**—In this act, unless the context otherwise requires:

*NOTE: The Negotiable Instruments Law, as set forth in the following pages, is given in the form in which the statute was adopted in New York and the section numbers are those which are used in the New York Statute. The original draft of the statute was prepared by Mr. John J. Crawford, of New York, who was designated for that work by a sub-committee of Commissioners for the Promotion of Uniformity of Legislation in the United States.

New York was the first of the states to enact the law and in that state the Commissioners' draft was adopted practically without alteration. The few minor changes, which were made, are noted after the sections in which they occur. In many of the other states, in which the law is now in force, the statute was materially altered by omission, addition, or change of phraseology. These changes will be found under state catchlines following the sections to which they apply.

"Acceptance " means an acceptance completed by delivery or notification.

"Action " includes counter-claim and set-off.

"Bank " includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer " means the person in possession of a bill or note which is payable to bearer.

"Bill " means bill of exchange, and "note " means negotiable promissory note.

"Delivery " means transfer of possession, actual or constructive, from one person to another.

"Holder " means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement " means an indorsement completed by delivery.

"Instrument " means negotiable instrument.

"Issue " means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person " includes a body of persons, whether incorporated or not.

"Value " means valuable consideration.

"Written " includes printed, and "writing " includes print.

South Dakota. In the definition of "Bank" the words "whether incorporated or not" are omitted.

§3. Person primarily liable on instrument.—The person "primarily " liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily " liable.

Kansas. The last sentence is omitted.

§4. Reasonable time, what constitutes.—In determining what is a "reasonable time " or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

§5. Time, how computed; when last day falls on holiday.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Note. The statutory construction law of the different states should be referred to in connection with this section. See Consolidated Laws of New York, 1909, sections 20, 24 and 25.

South Dakota. Two new sections are inserted in the South Dakota Act at this point:

192A. The apparent maturity of a bill of exchange, payable at sight, or on demand, is:

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

192B. The apparent maturity of a promissory note, payable at sight, or on demand, is:

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, six months after its date.

§6. Application of chapter.—The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Arizona. This section is omitted.

Arkansas, Delaware, and Vermont. The words, "prior to the taking effect hereof," are substituted for the words, "prior to the passage hereof."

Minnesota. The following is added: "Nor shall they be construed as modifying, repealing or superseding any of the terms and provisions of Sec. 2747, Revised Laws of 1905."

§7. Law merchant; when governs.—In any case not provided for in this act the rules of the law merchant shall govern.

Arkansas, Delaware, Minnesota, South Dakota, and Vermont. The words, "law and equity including," are inserted after the words, "the rules of."

Kentucky. This section is omitted.

South Dakota. The following provision is added at this point:

"195. Nothing in this Act contained shall be construed as in any manner repealing chapters 128, 140 and 141 of the Laws of 1905 and chapter 74 of the Laws of 1907."

ARTICLE II.

FORM AND INTERPRETATION.

- §20. Form of negotiable instrument.
- §21. Certainty as to sum; what constitutes.
- §22. When promise is unconditional.
- §23. Determinable future time; what constitutes.
- §24. Additional provisions not affecting negotiability.
- §25. Omissions; seal; particular money.
- §26. When payable on demand.
- §27. When payable to order.
- §28. When payable to bearer.
- §29. Terms, when sufficient.
- §30. Date, presumption as to.
- §31. Ante-dated and post-dated.
- §32. When date may be inserted.
- §33. Blanks, when may be filled.
- §34. Incomplete instrument not delivered.
- §35. Delivery; when effectual; when presumed.
- §36. Construction where instrument is ambiguous.
- §37. Liability of person signing in trade or assumed name.
- §38. Signature by agent; authority; how shown.
- §39. Liability of person signing as agent, et cetera.
- §40. Signature by procuration; effect of.
- §41. Effect of indorsement by infant or corporation.
- §42. Forged signature; effect of.

§20. Form of negotiable instrument.—An instrument to be negotiable must conform to the following requirements.

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

Arizona,¹ Idaho, Illinois, Iowa, North Carolina, West Virginia and Wyoming. ²Subdivision 4 reads, "must be payable to the order of a specified person, or to bearer."

Michigan. The words, "certain sum," are used instead of "sum certain" in subdivision 2.

Wisconsin. The following provision is added: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by any officer thereof or any other person, and no obligation nor instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable, shall be, or shall be deemed to be, negotiable according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

§21. Certainty as to sum; what constitutes.—The sum payable is a sum certain within the meaning of this act, although it is to be paid;

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Idaho, Iowa, North Carolina and Wyoming. The words "or of interest," are omitted in subdivision 3.

Minnesota. In Subdivision 4 of the words "on or at a given place" are inserted after the words "current rate."

Nebraska. The following provision is added: "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this State any sum for attorney's fees or other costs not allowable in other cases."

North Carolina. The following provision is added: "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection, incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments or the negotiability thereof."

South Dakota. Subdivision 5 reads, "Provided that nothing herein contained shall be construed to authorize any court to include in any judgment or (probably intended for on) an instrument made in this state, any sum for attorney fees or other costs not now taxable by law."

§22. When promise is unconditional.—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

§23. Determinable future time; what constitutes.—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Wisconsin. The following is substituted in place of the last paragraph: "4. At a fixed period after date or sight, though payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided."

§24. Additional provisions not affecting negotiability.—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Illinois. The words, "if the instrument be not paid at maturity," are omitted from subdivision 2.

Kentucky. Subdivision 3 is omitted.

North Carolina. Subdivision 2 is qualified; see, *supra* under §21.

South Dakota. Subdivisions 2 and 3 are omitted, subdivision 4 above being numbered subdivision 2 in the South Dakota Statute.

Wisconsin and Illinois. The following words are added to the last sentence: "or authorize the waiver of exemptions from execution."

§25. Omissions; seal; particular money.—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Illinois. These words are added at the beginning of subdivision 5: "Is payable in currency or current funds; or." The last sentence, beginning "But nothing in this section," is omitted.

South Dakota. The following is added at the end of the section: "or shall make negotiable in character a note which shows on its face that it is given for a consideration to be received in the future."

§26. When payable on demand.—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

§27. When payable to order.—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

Illinois. The following is inserted after subdivision 6: "7. An instrument payable to the estate of a deceased person, shall be deemed payable to the order of the administrator or executor of his estate."

South Dakota. The words "a specified person" are substituted for "him" in the first sentence. The words "it may be drawn payable to the order of" in the second sentence are omitted. In subdivision 5, the word "more" is used instead of "some."

§28. When payable to bearer.—The instrument is payable to bearer.

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

Illinois. Subdivision 3 reads as follows: "3. When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it." Subdivision 5 reads as follows: "5. When, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

§29. Terms when sufficient.—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Alabama, Idaho, Illinois, Iowa, West Virginia and Wyoming. The word "negotiable" is inserted before the word "instrument."

Wisconsin. The following is added: "Memoranda upon the face or back of the instrument, whether signed or not, material to the contract, if made at the time of delivery, are part of the instrument and parol evidence is admissible to show the circumstances under which they were made."

§30. Date, presumption as to.—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

§31. Ante-dated and post-dated.—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Missouri. By error the word "valid" is used instead of "invalid."

§32. When date may be inserted.—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

Arizona. The word "invalidate" is used instead of "avoid" in the last sentence.

South Carolina. The words "of issue" are omitted after the words "true date," apparently an error.

§33. Blanks; when may be filled.—Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Arkansas. The second sentence terminates with these words, "to fill up for any amount," instead of as above. The word "becomes" is used instead of "became" in the third sentence.

Illinois. The words "issued or," are inserted before "negotiated" in the last sentence.

South Dakota. This section reads as follows: "One who makes himself a party to an instrument, intended to be negotiable but which is left wholly or partly in blank for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course in whatever manner and at whatever time it may be filled so long as it remains negotiable in form."

Wisconsin. In the first sentence the words "prior to negotiation" are inserted before the words "by filling." The words "*prima facie*" are omitted in the second sentence.

§34. Incomplete instrument not delivered.—Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

§35. Delivery; when effectual; when presumed.—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Kansas. The next to the last (third) sentence is omitted.

North Carolina. The word "accepting" is omitted in the second sentence.

South Dakota. The next to the last (third) sentence reads as follows: "An indorsee of a negotiable instrument in due course acquires an absolute title thereto so that it is valid in his hands notwithstanding any provision of law making it generally void or voidable and notwithstanding any defect in the title of the person from whom he acquired it."

§36. Construction where instrument is ambiguous.—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Wisconsin. The following subdivision is added: "8. Where several writings are executed at or about the same time, as parts of the same transaction, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

§37. Liability of person signing in trade or assumed name.—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

§38. Signature by agent; authority; how shown.—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Kentucky. The words, "by an agent duly authorized in writing," are used in the first sentence instead of as above.

South Dakota. The words "an agent duly authorized in writing" are substituted for "duly authorized agent" in the first sentence. The word "written" is inserted before the word "appointment" in the second sentence. That portion of the last sentence after the words "for this purpose" is omitted.

§39. Liability of person signing as agent, etc.—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

South Dakota. "The principal" is used instead of "a principal" in the first sentence.

Virginia. The words "without disclosing his principal" are inserted after the word "capacity" in the first sentence.

§40. Signature by procuration; effect of.—A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

§41. Effect of indorsement by infant or corporation.—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

South Dakota. The words "or by an infant" and the words "or infant" are omitted.

§42. Forged signature; effect of.—Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Illinois and South Dakota. The following words are omitted: "of the person whose signature it purports to be."

South Carolina. The words "discharge thereof" are used instead of the words "discharge therefor."

ARTICLE III.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

§50. Presumption of consideration.

§51. What constitutes consideration.

§52. What constitutes holder for value.

§53. When lien on instrument constitutes holder for value.

§54. Effect of want of consideration.

§55. Liability of accommodation party.

§50. Presumption of consideration.—Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

§51. Consideration; what constitutes.—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Illinois. The last sentence reads: "An antecedent or pre-existing claim, whether for money or not, constitutes value where an instrument is taken either in satisfaction therefor, or as security therefor; and is deemed such," etc.

Wisconsin. The words "discharged, extinguished, or extended," are inserted after the word "debt" in the second sentence. The following is added to the section: "But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value."

§52. What constitutes holder for value.—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

§53. When lien on instrument constitutes holder for value.—Where the holder has a lien on the instrument, arising either from

contract or by implication of law, he is deemed a holder for value, to the extent of his lien.

South Dakota. The word "whether" is used instead of "where."

§54. Effect of want of consideration.—Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

§55. Liability of accommodation party.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Illinois. The first sentence omits the following words: "without receiving value therefor." The following is added at the end of the section: "and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

ARTICLE IV.

NEGOTIATION.

§60. What constitutes negotiation.

§61. Indorsement; how made.

§62. Indorsement must be of entire instrument.

§63. Kinds of indorsement.

§64. Special indorsement; indorsement in blank.

§65. Blank indorsement; how changed to special indorsement.

§66. When indorsement restrictive.

§67. Effect of restrictive indorsement; rights of indorsee.

§68. Qualified indorsement.

§69. Conditional indorsement.

§70. Indorsement of instrument payable to bearer.

§71. Indorsement where payable to two or more persons.

§72. Effect of instrument drawn or indorsed to a person as cashier.

- §73. Indorsement where name is misspelled, et cetera.
- §74. Indorsement in representative capacity.
- §75. Time of indorsement; presumption.
- §76. Place of indorsement; presumption.
- §77. Continuation of negotiable character.
- §78. Striking out indorsement.
- §79. Transfer without indorsement; effect of.
- §80. When prior party may negotiate instrument.

§60. What constitutes negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery, if payable to order it is negotiated by the indorsement of the holder completed by delivery.

§61. Indorsement; how made.—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Illinois. The following is added. "and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated."

§62. Indorsement must be of entire instrument.—The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

§63. Kinds of indorsement.—An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

Arkansas. The word "instrument" is used instead of "indorsement," apparently an error.

§64. Special indorsement; indorsement in blank.—A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument.

An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

§65. Blank indorsement; how changed to special indorsement.—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§66. When indorsement restrictive.—An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§67. Effect of restrictive indorsement; rights of indorsee.—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorseees acquire only the title of the first indorsee under the restrictive indorsement.

Illinois. The following is added to subdivision 2: "or except in the case of a restrictive indorsement specified in section 36-subsection 2 any action against the indorser or any prior party that a special indorsee would be entitled to bring." In subdivision 3, the words "his rights as such indorsee" are omitted and the words "the instrument" substituted. The following is added to subdivision 3: "specified in section 36-subsection 1—and as against the principal or *cestui que trust* only the title of the first indorsee under the restrictive indorsement specified in section 36—subsections 2 and 3 respectively." (Section 36 of the Illinois Act, referred to, corresponds to section 66, as above numbered.)

§68. Qualified indorsement.—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an

indorsement does not impair the negotiable character of the instrument.

Michigan. The word "instrument" is used instead of "indorsement" in the last sentence, clearly an error.

§69. Conditional indorsement.—Where an indorsement is conditional a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

South Dakota. The word "payment" in the first sentence is preceded by "a."

§70. Indorsement of instrument payable to bearer.—Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Illinois. The words "originally payable to or indorsed specially to bearer" are substituted for the words "payable to bearer."

§71. Indorsement where payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Wisconsin. The word "joint" is inserted before "indorsees."

§72. Effect of instrument drawn or indorsed to a person as cashier.—Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

South Dakota. The words "the indorsement of" following the word "either" are omitted.

§73. Indorsement where name is misspelled, et cetera.—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

§74. Indorsement in representative capacity.—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

§75. Time of indorsement; presumption.—Except where an indorsement bears date after the maturity of the instrument every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

§76. Place of indorsement; presumption.—Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

§77. Continuation of negotiable character.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

South Dakota. The following is added: "but a purchaser of the instrument after its maturity is not a holder in due course."

§78. Striking out indorsement.—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

South Dakota. "Owner" is substituted for "holder" in the first sentence.

§79. Transfer without indorsement; effect of.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Colorado. The words "if omitted by mistake, accident or fraud" are added to the first sentence.

Illinois and Missouri. The first sentence after the word "right" reads as follows: "to enforce the instrument against one who signed for the accommodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose," etc.

Wisconsin. The following is added to the section: "When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of transfer."

§80. When prior party may negotiate instrument.—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.

RIGHTS OF HOLDER.

- §90. Right of holder to sue; payment.
- §91. What constitutes a holder in due course.
- §92. When person not deemed holder in due course.
- §93. Notice before full amount paid.
- §94. When title defective.
- §95. What constitutes notice of defect.
- §96. Rights of holder in due course.
- §97. When subject to original defenses.
- §98. Who deemed holder in due course.

§90. Right of holder to sue; payment.—The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

§91. What constitutes a holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder, of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Wisconsin. The following is added: "5. That he took it in the usual course of business."

§92. When person not deemed holder in due course.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§93. Notice before full amount paid.—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

§94. When title defective.—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Kansas. The word "alleged" is used instead of "illegal," clearly an error.

Wisconsin. The following is added: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

§95. What constitutes notice of defect.—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

§96. Rights of holder in due course.—A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Illinois. After the word "themselves" there is inserted a clause, making an exception as to the defenses of fraud and gaming, provided for in Section 10, Act of March 18th, 1874, and in Sections 131 and 136 of Chapter 38 of the Revised Laws of Illinois.

Wisconsin. The following is added: "Except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and

also in cases where the title of the person negotiating such instrument is void under the provision of section 1676-25 (sec. 55 N. I. L.) of this act." (The section of the N. I. L. referred to is section 94, *supra*.)

§97. When subject to original defenses.—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Illinois and Wisconsin. The word "duress" is inserted after the word "fraud."

South Dakota. The second sentence is omitted.

§98. Who deemed holder in due course.—Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

South Dakota. The words "or some person under whom he claims" are omitted.

ARTICLE VI.

LIABILITY OF PARTIES.

§110. Liability of maker.

§111. Liability of drawer.

§112. Liability of acceptor.

§113. When person deemed indorser.

§114. Liability of irregular indorser.

§115. Warranty; where negotiation by delivery, et cetera.

§116. Liability of general indorsers.

§117. Liability of indorser where paper negotiable by delivery.

§118. Order in which indorsers are liable.

§119. Liability of agent or broker.

§110. Liability of maker.—The maker of a negotiable instrument by making it engages that he will pay it according to its

tenor; and admits the existence of the payee and his then capacity to indorse.

§111. Liability of drawer.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings of dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

Colorado and Illinois. The word "subsequent" is omitted.

Note. The District of Columbia and North Dakota statutes, read "accepted and paid" as above. In other states the statute reads "accepted or paid."

§112. Liability of acceptor.—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

Missouri. The word "then" is omitted in subdivision 2.

§113. When person deemed indorser.—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

South Dakota. "Indicated" is substituted for "indicates."

§114. Liability of irregular indorser.—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

Illinois. Subdivisions 1 and 2 read as follows: 1. "If the instrument is a note or bill payable to the order of a third person, or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties. 2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer."

§115. Warranty where negotiation by delivery, et cetera.—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provision of subdivision three of this section does not apply to persons negotiating public or corporate securities, other than bills and notes.

Illinois. The words "or render it valueless," in subdivision 4, are omitted.

§116. Liability of general indorser.—Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Illinois. The words "not an accommodating party" are inserted after the word "indorser" in the first sentence. In subdivision 1 the words "and four" are inserted after the word "three."

South Dakota. The words "not an accommodating party" are inserted after "every indorser" in the first line. In subdivision 1 the words "and four" are inserted after "three." The last paragraph reads: "And in addition every indorser who indorses without qualification engages," etc.

§117. Liability of indorser where paper negotiable by delivery.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

§118. Order in which indorsers are liable.—As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

Illinois. The last sentence reads: "All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable."

§119. Liability of agent or broker.—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

Illinois. The following is added: "Sec. 69a: Whenever any bill of exchange drawn or indorsed within this State and payable without this State is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable in the United States in case suit has to be brought thereon and on bills payable without the United States with or without suit, five per cent. damages in addition."

ARTICLE VII.

PRESENTMENT FOR PAYMENT.

§130. Effect of want of demand on principal debtor.

§131. Presentment where instrument is not payable on demand.

§132. What constitutes a sufficient presentment.

§133. Place of presentment.

§134. Instrument must be exhibited.

§135. Presentment where instrument payable at bank.

§136. Presentment where principal debtor is dead.

§137. Presentment to persons liable as partners.

- §138. Presentment to joint debtors.
- §139. When presentment not required to charge the drawer.
- §140. When presentment not required to charge the indorser.
- §141. When delay in making presentment is excused.
- §142. When presentment may be dispensed with.
- §143. When instrument dishonored by non-payment.
- §144. Liability of person secondarily liable, when instrument dishonored.
- §145. Time of maturity.
- §146. Time; how computed.
- §147. Rule where instrument payable at bank.
- §148. What constitutes payment in due course.

§130. Effect of want of demand on principal debtor.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Illinois. The words "except in the case of bank notes" are inserted after the words "liable on the instrument."

Wisconsin. The part of first sentence after the words "on the instrument" is omitted.

Note. The words "and has funds there available for that purpose" appear in the Kansas and Ohio statutes as in the New York Act, above, but are omitted from the statute as adopted in other states.

§131. Presentment where instrument is not payable on demand.—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Nebraska. The section ends with the words "reasonable time after its issue."

South Dakota. As to maturity of bills of exchange and promissory notes, payable on demand, in South Dakota, see sections added to the South Dakota Act, which are given *supra*, under Section 5.

Vermont. The words "its issue in order to charge the drawer" are substituted for "the last negotiation thereof."

§132. What constitutes a sufficient presentment.—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

§133. Place of presentment.—Presentment for payment is made at the proper place.

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

§134. Instrument must be exhibited.—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

§135. Presentment where instrument payable at bank.—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it an any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Nebraska. The section ends with the words "banking hours."

§136. Presentment where principal debtor is dead.—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.

§137. Presentment to persons liable as partners.—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

§138. Presentment to joint debtors.—Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

§139. When presentment not required to charge the drawer.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

§140. When presentment not required to charge the indorser.—Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

Illinois. The section ends with the words "for his accommodation."

§141. When delay in making presentment is excused.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

§142. When presentment may be dispensed with.—Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied.

§143. When instrument dishonored by non-payment.—The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

§144. Liability of person secondarily liable, when instrument dishonored.—Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

§145. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12 o'clock noon on Saturday when that entire day is not a holiday.

Arizona, Kentucky and Wisconsin. The last sentence beginning "instruments falling due" is omitted.

Colorado. The third sentence reads as follows: "Instruments falling due on any day, in any place where any part of such day is a holiday, are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours of the part of such day which is not a holiday."

Delaware. The word "business" is omitted in the second sentence.

Iowa. The following provision, known as section 3060-a198, of the Code of 1907, is added: "A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face."

Massachusetts. The following is added to the first sentence: "except that three days of grace shall be allowed upon a draft or bill of exchange made payable within this Commonwealth at sight, unless there is an express stipulation to the contrary." See also Note below.

New Hampshire. After the words "without grace" in the first sentence the following is added: "except that 3 days of grace shall be allowed upon a draft or bill of exchange, made payable within this State, unless there is an express stipulation to the contrary." See also Note, below.

North Carolina. The Act provides that negotiable instruments are payable without grace except that "all bills of exchange payable within the state, at sight, in which there is no express stipulation to the contrary, and not otherwise, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange, payable at the expiration of a certain period after date or sight; provided, that no days of grace shall be allowed on any bill of exchange, promissory note or draft payable on demand." The words "when it is a holiday" are inserted after "payable on Saturday" in the last sentence.

Rhode Island. The words "except sight drafts" are inserted after "instrument" in the first sentence.

Vermont. The following words are omitted: "Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that."

Note. The words "or becoming payable" in the third sentence appear in the Arkansas, Indiana, Kansas, Minnesota, Missouri and Virginia statutes as in the New York Act, above, but are omitted from the Act as adopted in other states. In New Hampshire the words "or payable" are used at this point. The same words were inserted in the Massachusetts Act by amendment in 1902. These words are surplusage and have no apparent effect upon the meaning of this section.

§146. Time; how computed.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

§147. Rule where instrument payable at bank.—Where an instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Illinois, Nebraska and South Dakota. This section is omitted.

Minnesota. The words "it shall not be equivalent" are used instead of "it is equivalent."

New Jersey. The following is added by amendment, P. L. 1909, p. 227. "But where the instrument is made payable at a fixed or determinable future time, the order to the bank is limited to the day on which the instrument is payable."

§148. What constitutes payment in due course.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VIII.

NOTICE OF DISHONOR.

- §160. To whom notice of dishonor must be given.
- §161. By whom given.
- §162. Notice given by agent.
- §163. Effect of notice given on behalf of holder.
- §164. Effect where notice is given by party entitled thereto.
- §165. When agent may give notice.
- §166. When notice sufficient.
- §167. Form of notice.
- §168. To whom notice may be given.
- §169. Notice where party is dead.
- §170. Notice to partners.
- §171. Notice to persons jointly liable.
- §172. Notice to bankrupt.
- §173. Time within which notice must be given.
- §174. Where parties reside in same place.
- §175. Where parties reside in different places.
- §176. When sender deemed to have given due notice.
- §177. Deposit in post-office, what constitutes.
- §178. Notice to subsequent parties, time of.
- §179. Where notice must be sent.
- §180. Waiver of notice.
- §181. Whom affected by waiver.
- §182. Waiver of protest.
- §183. When notice dispensed with.
- §184. Delay in giving notice; how excused.
- §185. When notice need not be given to drawer.
- §186. When notice need not be given to indorser.
- §187. Notice of non-payment where acceptance refused.
- §188. Effect of omission to give notice of non-acceptance.
- §189. When protest need not be made; when must be made.

§160. To whom notice of dishonor must be given.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

§161. By whom given.—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

South Carolina. The words "or on behalf of any party" are used instead of "or by or on behalf of any party."

§162. Notice given by agent.—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice whether that party be his principal or not.

Arkansas. This section reads "any agent" instead of "an agent."

Delaware. The word "entitled" is omitted.

§163. Effect of notice given on behalf of holder.—Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§164. Effect where notice is given by party entitled thereto.—Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§165. When agent may give notice.—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

Arkansas. The last sentence after the words "upon the receipt of" reads as follows: "such notice himself must do so within the same time for giving notice as if the agent had been an independent holder."

Delaware. The last sentence after the words "upon the receipt of" reads as follows: "such notice himself the same time for giving notice as if the agent had been an independent holder."

§166. When notice sufficient.—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of

the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Kentucky. The first sentence reads as follows: "A written notice need be signed and an insufficient written notice may be supplemented and validated by a written communication."

South Dakota. The words "the notice" following the word "vitate" are omitted.

§167. Form of notice.—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

Kentucky. The words "or merely oral" are omitted.

§168. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf.

§169. Notice where party is dead.—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Arkansas. The words "must be sent by mail" are used instead of "may be sent" in the last sentence.

§170. Notice to partners.—Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

§171. Notice to persons jointly liable.—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

§172. Notice to bankrupt.—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§173. Time within which notice must be given.—Notice may be given as soon as the instrument is dishonored; and unless

delay is excused as hereinafter provided, must be given within the times fixed by this act.

§174. Where parties reside in same place.—Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;

2. If given at his residence, it must be given before the usual hours of rest on the day following;

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

§175. Where parties reside in different places.—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

§176. When sender deemed to have given due notice.—Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

§177. Deposit in post-office; what constitutes.—Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the post-office department.

§178. Notice to subsequent* party; time of.—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

*Error in engrossing. The word should be "antecedent."

§179. Where notice must be sent.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or
2. If he live in one place, and have his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

§180. Waiver of notice.—Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

§181. Whom affected by waiver.—Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

§182. Waiver of protest.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

§183. When notice is dispensed with.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Arkansas. The word "when" is omitted.

§184. Delay in giving notice; how excused.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Minnesota. The words "this default" are used instead of "his default."

§185. When notice need not be given to drawer.—Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. Where the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

§186. When notice need not be given to indorser.—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

§187. Notice of non-payment where acceptance refused.—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary unless in the meantime the instrument has been accepted.

§188. Effect of omission to give notice of non-acceptance.—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Wisconsin. The following is added: "But this shall not be construed to revive any liability discharged by such omission."

§189. When protest need not be made; when must be made.—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

Vermont. The following is added: "But the provisions of this section shall not be held to dispense with demand and notice of dishonor

as provided by sections 71 and 90." (Sections 71 and 90 of the Vermont Statute, referred to, correspond to sections 131 and 161, as numbered above.)

ARTICLE IX.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

§200. Instrument; how discharged.

§201. When person secondarily liable on, discharged.

§202. Right of party who discharges instrument.

§203. Renunciation by holder.

§204. Cancellation; unintentional; burden of proof.

§205. Alteration of instrument; effect of.

§206. What constitutes a material alteration.

§200. Instrument; how discharged*—A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

*Through an error in engrossing the words in the headline have been transposed. It was intended to read "How instrument discharged."

Illinois. Subdivision 4 is omitted.

South Carolina. Subdivision 4 begins "By the other act" instead of "By any other act."

§201. When persons secondarily liable on, discharged.—A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, (unless made with the assent of the party secondarily liable, or) unless the right of recourse against such party is expressly reserved.

Arkansas. The word "money" is used instead of "payment" in subdivision 4.

Illinois. Subdivision 3 is omitted. To subdivision 4 (subdivision 5, as numbered above) the following is added: "or unless the principal debtor be an accommodating party." Subdivision 5 (subdivision 6, as numbered above) reads as follows: "By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent, prior or subsequent, of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party."

Missouri. The following is added to subdivision 3: "except when such discharge is had in bankruptcy proceedings."

Wisconsin. The following subdivision is inserted: "4a. By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes." The words "prior, or subsequent" are inserted after the word "assent" in subdivision 6 and the following words are added to this subdivision: "or unless he is fully indemnified."

Note. The portion of subdivision 6 included in the parenthesis was omitted from the New York Act by an error in engrossing. These words are also omitted from the statute as adopted in Maryland and Rhode Island but are included in the statute as adopted in other states.

§202. Right of party who discharges instrument.—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

§203. Renunciation by holder.—The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renun-

ciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§204. Cancellation; unintentional; burden of proof.—A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

§205. Alteration of instrument; effect of.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Illinois. The section reads: "Where a negotiable instrument is fraudulently or materially altered by the holder without the assent of all parties," etc.

Wisconsin. The words "orally or in writing" are inserted after the word "assented" in the first sentence.

§206. What constitutes a material alteration.—Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

ARTICLE X.

BILLS OF EXCHANGE; FORM AND INTERPRETATION.

§210. Bill of exchange defined.

§211. Bill not an assignment of funds in hands of drawee.

§212. Bill addressed to more than one drawee.

§213. Inland and foreign bills of exchange.

§214. When bill may be treated as promissory note.

§215. Referee in case of need.

§210. Bill of exchange defined.—A bill of exchange is an unconditional order in writing addressed by one person to another signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

§211. Bill not an assignment of funds in hands of drawee.—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

§212. Bill addressed to more than one drawee.—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

Wisconsin. The words "or in succession" are omitted.

§213. Inland and foreign bills of exchange.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

§214. When bill may be treated as promissory note.—Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Wisconsin. The words "or a person" are omitted.

§215. Referee in case of need.—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

ARTICLE XI.

ACCEPTANCE OF BILLS OF EXCHANGE.

§220. Acceptance, how made, et cetera.

§221. Holder entitled to acceptance on face of bill.

§222. Acceptance by separate instrument.

§223. Promise to accept; when equivalent to acceptance.

§224. Time allowed drawee to accept.

§225. Liability of drawee retaining or destroying bill.

§226. Acceptance of incomplete bill.

§227. Kinds of acceptances.

§228. What constitutes a general acceptance.

§229. Qualified acceptance.

§230. Rights of parties as to qualified acceptance.

§220. Acceptance; how made, et cetera.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Indiana. The word "any" is omitted from the last sentence.

§221. Holder entitled to acceptance on face of bill.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

§222. Acceptance by separate instrument.—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Illinois and South Dakota. The words "to whom it is shown and" are omitted.

§223. Promise to accept; when equivalent to acceptance.—

An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person, who, upon the faith thereof, receives the bill for value.

Illinois and South Dakota. The words "or after" are inserted before the words "it is drawn."

§224. Time allowed drawee to accept.—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

§225. Liability of drawee retaining or destroying bill.—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

Illinois and South Dakota. This section is omitted.

Wisconsin. The following is added: "Mere retention of the bill is not an acceptance."

§226. Acceptance of incomplete bill.—A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Illinois and South Dakota. The word "payable" is inserted before the word "accepted" in the second sentence.

§227. Kinds of acceptance.—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Indiana. The word "acceptor" is used instead of "acceptance" in the first sentence, clearly an error.

§228. What constitutes a general acceptance.—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

§229. Qualified acceptance.—An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

§230. Rights of parties as to qualified acceptance.—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

§240. When presentment for acceptance must be made.

§241. When failure to present releases drawer and indorser.

§242. Presentment; how made.

§243. On what days presentment may be made.

§244. Presentment; where time is insufficient.

§245. When presentment is excused.

§246. When dishonored by non-acceptance.

§247. Duty of holder where bill not accepted.

§248. Rights of holder where bill not accepted.

§240. When presentment for acceptance must be made.—

Presentment for acceptance must be made:

1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Arkansas. The word "payment" is used instead of "acceptance" in the first sentence, apparently an error.

South Dakota. At the end of the section these words are added: "other than the drawee."

§241. When failure to present releases drawer and indorser.—

Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

§242. Presentment; how made.—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

§243. On what days presentment may be made.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two and one hundred and forty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

Colorado. The following is substituted in place of the last sentence: "When any day is in part a holiday presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday."

Kentucky and Wisconsin. The last sentence is omitted.

§244. Presentment where time is insufficient.—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting in for payment is excused and does not discharge the drawers and indorsers.

North Carolina. The word "executed" is used instead of "excused," clearly an error.

§245. Where presentment is excused.—Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;
2. Where after the exercise of reasonable diligence, presentment cannot be made;
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

§246. When dishonored by non-acceptance.—A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

§247. Duty of holder where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

South Dakota. The word "presented" is used instead of "accepted," clearly an error.

§248. Rights of holder where bill not accepted.—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

ARTICLE XIII.

PROTEST OF BILLS OF EXCHANGE.

§260. In what cases protest necessary.

§261. Protest; how made.

§262. Protest; by whom made.

§263. Protest; when to be made.

§264. Protest; where made.

§265. Protest both for non-acceptance and non-payment.

§266. Protest before maturity where acceptor insolvent.

§267. When protest dispensed with.

§268. Protest, where bill is lost, et cetera.

§260. In what cases protest necessary.—Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

§261. Protest; how made.—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;

3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§262. Protest; by whom made.—Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Arkansas. The word "responsible" is used instead of "respectable" in subdivision 2.

§263. Protest; when to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

§264. Protest; where made.—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

§265. Protest both for non-acceptance and non-payment.—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§266. Protest before maturity where acceptor insolvent.—Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

§267. When protest dispensed with.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§268. Protest where bill is lost, et cetera.—When a bill is lost or destroyed or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE XIV.

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

§280. When bill may be accepted for honor.

§281. Acceptance for honor; how made.

§282. When deemed to be an acceptance for honor of the drawer.

§283. Liability of acceptor for honor.

§284. Agreement of acceptor for honor.

§285. Maturity of bill payable after sight; accepted for honor.

§286. Protest of bill accepted for honor, et cetera.

§287. Presentment for payment to acceptor for honor; how made.

§288. When delay in making presentment is excused.

§289. Dishonor of bill by acceptor for honor.

§280. When bill may be accepted for honor.—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

§281. Acceptance for honor; how made.—An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§282. When deemed to be an acceptance for honor of the drawer.—When an acceptance for honor does not expressly

state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§283. Liability of acceptor for honor.—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

§284. Agreement of acceptor for honor.—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§285. Maturity of bill payable after sight; accepted for honor.—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§286. Protest of bill accepted for honor, et cetera.—Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§287. Presentment for payment to acceptor for honor; how made.—Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.

§288. When delay in making presentment is excused.—

The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§289. Dishonor of bill by acceptor for honor.—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

§300. Who may make payment for honor.

§301. Payment for honor; how made.

§302. Declaration before payment for honor.

§303. Preference of parties offering to pay for honor.

§304. Effect on subsequent parties where bill is paid for honor.

§305. Where holder refuses to receive payment supra protest.

§306. Rights of payer for honor.

§300. Who may make payment for honor.—Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

§301. Payment for honor; how made.—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

§302. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf declaring his intension to pay the bill for honor and for whose honor he pays.

§303. Preference of parties offering to pay for honor.—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§304. Effect on subsequent parties where bill is paid for honor.—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but

the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

§305. Where holder refuses to receive payment supra protest.—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§306. Rights of payer for honor.—The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.

BILLS IN A SET.

§310. Bills in sets constitute one bill.

§311. Rights of holders where different parts are negotiated.

§312. Liability of holder who indorses two or more parts of a set to different persons.

§313. Acceptance of bills drawn in sets.

§314. Payment by acceptor of bills drawn in sets.

§315. Effect of discharging one of a set.

§310. Bills in sets constitute one bill.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

§311. Rights of holders where different parts are negotiated.—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

§312. Liability of holder who indorses two or more parts of a set two different persons.—Where the holder of a set

indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

§313. Acceptance of bills drawn in sets.—The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

§314. Payment by acceptor of bills drawn in sets.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§315. Effect of discharging one of a set.—Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

Wisconsin. The following provisions are inserted at this point: "Sec. 1682. Whenever any bill of exchange drawn or indorsed within this state and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same at the current rate of exchange at the time of the demand and damages at the rate of five per cent. upon the contents thereof, together with interest on the said contents to be computed from the date of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses.

"Sec. 1683. If any bill of exchange drawn upon any person or corporation out of this state, but within some state or territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment the drawer or endorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest according to its tenor and five per cent. damages, together with costs and charges of protest."

ARTICLE XVII.

PROMISSORY NOTES AND CHECKS.

§320. Promissory note defined.

§321. Check defined.

§322. Within what time a check must be presented.

§323. Certification of check; effect of.

§324. Effect where holder of check procures it to be certified.

§325. When check operates as an assignment.

§326. Recovery of forged check.

§320. Promissory note defined.—A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§321. Check defined.—A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

§322. Within what time a check must be presented.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Illinois and South Dakota. After the word "issue" the following is inserted: "and notice of dishonor given to the drawer as provided for in the case of bills of exchange."

§323. Certification of check; effect of.—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

§324. Effect where the holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

§325. When check operates as an assignment.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

§326. Recovery of forged check.—No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised.

Note. This section was not in the statute as originally adopted in New York, but was added by Chapter 287 of the Laws of 1904. This provision appears in the New Jersey statute, as section 189a, having been added by amendment, P. L. 1908, p. 424. It does not appear in the Act as adopted in other states. The statutes of the various states should be consulted as to the time allowed for bringing an action against the bank for the payment of a forged check.

ARTICLE XVIII.*

NOTES GIVEN FOR PATENT RIGHTS AND FOR A SPECULATIVE CONSIDERATION.

§330. Negotiable instruments given for patent rights.

§331. Negotiable instruments given for a speculative consideration.

§332. How negotiable bonds are made non-negotiable.

§330. Negotiable instruments given for patent rights.—A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a ne-

*This article appears only in New York and Ohio acts.

gotiable instrument given solely for the purchase price or the use of a patented article.

Note: This provision appears only in the New York and Ohio Acts.

§331. Negotiable instrument for a speculative consideration.—

If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearing showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

Note: This provision appears only in the New York and Ohio Acts.

§332. How negotiable bonds are made non-negotiable.—

The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

Note: This provision appears only in the New York and Ohio Acts.

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